Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

TOPPS COMPANY, INC.,

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, lure out-of-state businesses to ply their trade within its borders by providing binding written assurances that they will not be taxed so long as they comply with the relevant federal tax immunity statute (the "bait"), and then, expecting its assurances to be relied upon, abandon deference to that federal statute and retroactively assess taxes based upon a fundamentally different standard (the "switch")?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties to the appellate proceeding in the Michigan Court of Appeals, whose decision below is sought to be reviewed.

Topps Company, Inc., Appellant below. Petitioner is not a subsidiary or affiliate of a publicly owned corporation.

Revenue Division of the Department of Treasury, State of Michigan, Appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

The Tax In Question 3

The Bait 3

The Switch 6

REASONS FOR GRANTING THE WRIT 7

I. THE STATE'S UNCONSTITUTIONAL "BAIT AND SWITCH" TAXATION TACTICS VIOLATE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS BY RETROACTIVELY DEPRIVING PETITIONER OF PROPERTY IN A FUNDAMENTALLY UNFAIR MANNER .. 9

TABLE OF CONTENTS – Continued

Page

II. THE STATE'S UNCONSTITUTIONAL "BAIT AND SWITCH" TAXATION TACTICS VIOLATE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS BY RETROACTIVELY DEPRIVING PETITIONER OF PROPERTY THROUGH A SUMMARY AGENCY PROCEDURE THAT NEITHER CONFORMED TO THE TENETS OF ADMINISTRATIVE ADJUDICATION NOR KEPT WITHIN THE CONFINES OF ADMINISTRATIVE RULEMAKING 15

III. THE STATE'S "BAIT AND SWITCH" TAXATION TACTICS HAVE WIDE-RANGING NEGATIVE EFFECTS ON OUT-OF-STATE BUSINESSES, WHICH MAY ONLY BE RECTIFIED BY THIS COURT 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Beistle Co. v. Pennsylvania, 640 A.2d 483 (Pa. Commw. Ct. 1991), *aff'd*, 638 A.2d 943 (Pa. 1994) 13

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 17

Cosmair, Inc. v. Michigan Dep't of Treasury, No. 198240 (Mich. Ct. App. 1998) 22

Dykstra v. Dep't of Natural Resources, 499 N.W.2d 367 (Mich. Ct. App. 1993) 19

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 16

First Chicago NBD Corp. v. Dep't of State Revenue, 708 N.E.2d 631 (Ind. Tax 1999) 13

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 17

Gillette Co. v. Michigan Dep't of Treasury, 497 N.W.2d 595 (Mich. Ct. App. 1993) ..... *passim*

In re Appeal of Kelly Services, Inc., 1997 WL 466851 (Cal. St. Bd. Eq. May 8, 1997) 13

Kellogg Sales Co. v. Dep't of Revenue, 10 Or. Tax 480, 1987 WL 18463 (1987) 13

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 14

Lewis v. BT Inv. Managers, Inc., 447 U.S. 279 (1980) 12

Luttrell v. Dep't of Corrections, 365 N.W.2d 74 (Mich. 1984) 19

Magreta v. Ambassador Steel Co., 158 N.W.2d 473 (Mich. 1968) 19

Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 14

TABLE OF AUTHORITIES – Continued

Page

Quill Corp. v. North Dakota, 504 U.S. 298 (1992).. *passim*

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1944) 14

Superior Indus., Inc. v. Dep't of Treasury, No. 230853, 1998 WL 213228 (Mich. Tax Trib. Jan. 12, 1998) 23

Syntex Lab. v. Dep't of Treasury, 590 N.W.2d 612 (Mich. Ct. App. 1998), *lv. den.*, 607 N.W.2d 726 (Mich. 2000) 22

Tate & Lyle, Inc. v. Comm'r of Internal Revenue Service, 87 F.3d 99 (3rd Cir. 1996) 17, 18

Trivona Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 9

Town & Country Dodge, Inc. v. Dep't of Treasury, 362 N.W.2d 618 (Mich. 1984) 9

United States v. Hudson, 299 U.S. 498 (1937) 11

United States v. Hemme, 476 U.S. 558 (1986) 11

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 14

Welch v. Henry, 305 U.S. 134 (1938) 11, 16

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 23

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST., amend. XIV, § 1 .....2, 24

28 U.S.C. § 1257(a) 1

Pub. L. No. 86-272 (codified as amended at 15 U.S.C. § 381 ..... *passim*

I.R.C. § 7805(b) 18

TABLE OF AUTHORITIES – Continued

Page

MICH. COMP. LAWS § 205.3(f) 2, 10, 21

MICH. COMP. LAWS § 208.1 3

MICH. COMP. LAWS § 208.80(2) 21

MICH. COMP. LAWS § 24.203(3) 21

MICH. COMP. LAWS § 24.203(6) 2, 4, 10, 20

7A U.L.A. 356 (1999) 13

Revenue Administrative Bulletin 1989-34 ..... 2, 4, 10, 18

Revenue Administrative Bulletin 1989-46 ..... *passim*

Revenue Administrative Bulletin 1998-1 ..... 2, 21

Single Business Tax Bulletin 1980-1 ..... 2, 4, 10, 20

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner Topps Company, Inc. (Topps) respectfully requests the Court to issue a writ of certiorari to review the opinion of the Michigan Court of Appeals endorsing the state's "bait and switch" taxation tactics, by which out-of-state businesses like Topps were lured into the state with promises of tax immunity and retroactively subjected to taxation years after they arrived.

OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is set forth in App. 15. The opinion of the Michigan Court of Appeals is set forth in App. 8-14. The denial of reconsideration by the Michigan Court of Claims is set forth in App. 5-7. The judgment entered by the Michigan Court of Claims is set forth in App. 1-4.

JURISDICTION

The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. § 1257(a). The Michigan Court of Appeals entered its opinion on June 11, 1999, rejecting Topps' challenges to the state's "retroactive application of the due process/commerce clause test" taken from the Court's opinion in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *Topps Company, Inc. v. Revenue Division of the*

Department of Treasury of the State of Michigan, Court of Appeals of the State of Michigan, No. 203495 at 2, set forth in App. 8-14. Topps timely filed an application for leave to appeal with the Supreme Court of the State of Michigan. Although the Chief Justice would have granted the application, the Michigan Supreme Court denied it on May 5, 2000. The Michigan Supreme Court's denial of leave is set forth in App. 15.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves consideration of U.S. CONST. amend. XIV, § 1, set forth in App. 17; Pub. L. No. 86-272, codified as amended at 15 U.S.C. § 381, set forth in App. 18-19; MICH. COMP. LAWS § 205.3(f), set forth in App. 22-25; MICH. COMP. LAWS § 24.203(6) (1979), set forth in App. 20-21; State of Michigan Department of Treasury Single Business Tax Bulletin 1980-1, set forth in App. 38-42; State of Michigan Department of Treasury Revenue Administrative Bulletin 1989-34, set forth in App. 51-55; State of Michigan Department of Treasury Revenue Administrative Bulletin 1989-46, set forth in App. 43-50; and State of Michigan Department of Treasury Revenue Administrative Bulletin 1998-1, set forth in App. 56-70.

STATEMENT OF THE CASE

This petition seeks review of a Michigan Court of Appeals decision denying Topps, a manufacturer and distributor of sporting cards, gum, and related products,

relief from the retroactive assessment of the Michigan "Single Business Tax" (SBT). Topps is a multistate business headquartered in New York. Topps' products are manufactured in Pennsylvania.

The Tax In Question

The Single Business Tax Act imposes a tax on the adjusted tax base of "every person with business activity" in the state of Michigan. MICH. COMP. LAWS § 208.1 et seq. (1979). An out-of-state business, like Topps, is subject to the SBT only if it has sufficient "nexus" with Michigan. From 1980 through 1993, the State of Michigan employed a narrow standard contained in a federal tax immunity statute in determining whether such a nexus existed. This original, narrow nexus standard came from Pub. L. No. 86-272 (codified as amended at 15 U.S.C. § 381), App. 18-19, which prohibits a state from imposing a "net income tax" if an out-of-state business' only in-state business activity is mere solicitation. In 1993, the state unexpectedly reversed course and retroactively applied a broad nexus standard based on the decision of the Michigan Court of Appeals in *Gillette Company v. Michigan Dep't of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993).

The Bait

In 1980, the Michigan Department of Treasury (the "Department") notified taxpayers through a Bulletin that the nexus standard for the SBT would be the narrow,

mere solicitation standard of Pub. L. No. 86-272. *See* Single Business Tax Bulletin 1980-1, App. 38-42. Under Michigan law, guidelines of administrative agencies, like the Treasury Department's Bulletins, are binding on the agency that promulgates them. *See* MICH. COMP. LAWS § 24.203(6) (1979), App. 20-21. In 1989, in a "Bulletin on Bulletins," the Department assured taxpayers that the standards announced in its Bulletins were binding on the Department under state law, thus precluding retroactive application.[1] *See* Revenue Administrative Bulletin 1989-34, App. 51-55. Approximately a month and a half after so confirming the binding authority of its Bulletins, the Department issued Revenue Administrative Bulletin 1989-46, confirming that Pub. L. No. 86-272 remained the appropriate nexus standard for the Single Business Tax. In addition to ratifying the 1980 Single Business Tax Bulletin, which announced Pub. L. No. 86-272 as the nexus standard, Revenue Administrative Bulletin 1989-46

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[1] Revenue Administrative Bulletin 1989-34 provides:

> The purpose of this Bulletin is to establish the general procedures for issuing Bulletins and Letter Rulings as position statements of the Bureau of Revenue. These documents are to provide guidance to persons regarding the proper interpretation and application of Michigan tax laws administered by the Bureau of Revenue . . . . A Revenue Administrative Bulletin states the official position of the Department, *has the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied on by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth in the Bulletin.* (Emphasis added).

App. 51-52.

characterized an extensive listing of in-state activities as "immune" from the SBT, including:

> 9. Soliciting sales by an in-state resident employee of the taxpayer, provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

App. 48.

Based on the Department's assurances in these Bulletins, Topps deliberately limited its operations in Michigan to avoid the SBT. *See* App. 99. It maintained no offices in the state, utilized a sales force of only two resident employees in-state (who worked out of their homes and solicited customers in other states as well), and restricted those employees to showing samples of Topps' products and soliciting orders to be filled out of state.

In 1993, the Michigan Court of Appeals unexpectedly announced in its *Gillette* decision that Pub. L. No. 86-272 was not the proper jurisdictional standard and that Michigan would have a new, broader nexus standard based on the Court's decision in *Quill, supra*. *See Gillette*, 497 N.W.2d at 600. The newly adopted *Quill* standard would allow out-of-state businesses like Topps to be taxed under the Single Business Tax Act even when they limited their "business activity" within the state to the "mere solicitation" that precluded them from being taxed under Pub. L. No. 86-272. The Court of Appeals arrived at this standard *sua sponte*: Neither party to the suit had briefed or argued the nexus standard and each proceeded in the belief that Pub. L. No. 86-272 was the correct jurisdictional rule. Topps was neither a party to the *Gillette* case nor had a case pending at the time *Gillette* was decided, and it was

not affected by the *Quill* nexus standard adopted in *Gillette* until subsequent action by the Michigan Department of Treasury.

The Switch

Following the 1993 *Gillette* decision, the Department retroactively assessed tax on Topps and other out-of-state businesses based on the *Quill* nexus standard. The Department conducted an audit of Topps in 1994, after which it levied the Single Business Tax for fiscal years ended February, 1992 and February, 1993, for engaging in what the Department had previously characterized as tax "immune activities." The Department also refused Topps' request, made during the audit, for a refund of Single Business Taxes that Topps believed were paid erroneously for fiscal years ended February, 1990 and February, 1991.[2] Topps paid the newly applied taxes under protest and then brought suit in the Michigan Court of Claims.[3]

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[2] As the Department's auditor reported to his superiors, Topps relied on Revenue Administrative Bulletin 1989-46 in deciding not to file SBT returns in fiscal years ended February 1992 and 1993. *See* App. 88-90 (showing a portion of the Michigan auditor's letter to his superiors). Moreover, the report indicates that while Topps filed SBT returns in 1990 and 1991, Topps was still acting with reference to Revenue Administrative Bulletin 1989-46, having mistakenly interpreted it to mean that samples kept in state by its two employees exceeded the tax immunity afforded by the Bulletin.

[3] Topps has voluntarily paid the SBT since the 1993 Michigan Court of Appeals decision in *Gillette*.

Topps comes to the Court having exhausted its state remedies. The Michigan Court of Claims rejected Topps' due process challenge to the retroactive application of the *Quill* nexus standard, as well as its motion for reconsideration. Topps appealed as of right to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed the lower court on the grounds that the retroactive assessment of the Single Business Tax did not violate the Due Process Clause. *See* App. 11-14. Topps then applied to the Michigan Supreme Court for leave to appeal. Although the Chief Justice would have granted leave, the court denied the application, prompting Topps to file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case for four reasons. First, the question presented involves negative consequences that are national in scope. Over 1,600 similarly situated multistate businesses have been subjected to the state's bait and switch tactics. These tactics have produced doubt and confusion in the national marketplace. The national impact of letting the lower court decision stand will be to continue and extend this uncertainty.

Second, the decision below is but one in a series of decisions by the Michigan courts concerning the state's bait and switch tactics that have generated confusion and uncertainty. A decision in this case is likely to produce an opinion giving badly needed guidance to the lower courts.

Third, allowing the decision below to stand would condone and, in fact, encourage states to induce out-of-state businesses to enter the state market under assurances that may then be retroactively changed or withdrawn. This sort of behavior, if unremedied by the Court, will discourage multistate businesses from furnishing their goods and services to residents of other states. All these results run counter to the common good.

Fourth, and finally, the question presented has not been one previously addressed by the Court, and, because of the magnitude and severity of the injury, is one badly in need of the authoritative voice of the Court. The decision below would provide an excellent vehicle for the Court to address this critical due process question.

The essence of Topps' challenge is that the State of Michigan has engaged in an unconstitutional "bait and switch." The "bait" was written notice from the state's Treasury Department that, so long as an out-of-state business complied with the relevant federal statute, it could enter the state and engage in business activity without being subject to the Single Business Tax. The "switch" was a four year retroactive assessment of the tax by that state agency, in effect changing the rules of the game, not during the game, but after it had already been played. This bait and switch violates petitioner's due process rights, not merely because it is retroactive, but because the state itself lured out-of-state businesses into its market by assuring them that it would *not* apply the Single Business Tax, telling those businesses that these assurances were binding, and then, notwithstanding those now-vapid assurances to the contrary, retroactively taxing the out-of-state businesses years after they arrived.

It is as if the highway one travels to and from work were retroactively converted by the state into a toll road, with each driver presented a bill for the equivalent of the daily toll for the last four years.

Not only do these bait and switch tactics violate the tenets of fundamental fairness and substantive due process, but the state's exercise of them through a non-adjudicative, non-rulemaking administrative agency procedure forces the conclusion that the state has also violated Topps' procedural due process rights.

I. THE STATE'S UNCONSTITUTIONAL "BAIT AND SWITCH" TAXATION TACTICS VIOLATE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS BY RETROACTIVELY DEPRIVING PETITIONER OF PROPERTY IN A FUNDAMENTALLY UNFAIR MANNER.

In 1975, Michigan enacted the Single Business Tax Act, a value added tax unique to Michigan. The Michigan Supreme Court has described the SBT as "new and experimental" legislation. *Town & Country Dodge, Inc. v. Dep't of Treasury,* 362 N.W.2d 618, 623 (Mich. 1984). This Court has also recognized that Michigan is the only state to have enacted a value added tax like the SBT. *Trivona Corp. v. Michigan Dep't of Treasury,* 498 U.S. 358, 362 (1991). Moreover, the Act does not contain a provision that expresses its jurisdictional reach. From its inception, therefore, the SBT was a tax peculiar to Michigan, and one in need of interpretation and explanation to those from outside the state.

Against this backdrop, Topps' due process challenge begins with the understanding that the state did not

merely reverse course without notice, but that it affirmatively gave notice that it would not reverse course. The Michigan Department of Treasury issues statutorily authorized Bulletins, which advise current and potential taxpayers of that agency's interpretation of relevant tax law. *See* MICH. COMP. LAWS § 205.3(f). In 1980, the Department issued Single Business Tax Bulletin 1980-1, notifying the public that the relevant nexus standard for determining when a party would become subject to the SBT would be Pub. L. No. 86-272. *See* App. 38-42. Under this standard, so long as out-of-state businesses[4] engaged only in "mere solicitation," they would lack sufficient nexus with Michigan and would, accordingly, not be subject to the Single Business Tax. *See id.* Treasury Bulletins, such as Single Business Tax Bulletin 1980-1, are "guidelines" under Michigan law and, as such, are not necessarily binding on courts or other parties, but *are* binding on the agencies that promulgate them. *See* MICH. COMP. LAWS § 24.203(6), App. 20-21. In fact, in 1989, the Department even issued a "Bulletin on Bulletins," to confirm the binding nature of its Revenue Administrative Bulletins. *See* Revenue Administrative Bulletin 1989-34, App. 51-55. A little more than one month later, the Department issued Revenue Administrative Bulletin 1989-46, confirming that

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[4] It is important for the Court to note that *only* out-of-state businesses like Topps were adversely affected by the Department's bait and switch tactics. In-state businesses, by definition, already have sufficient nexus to be taxed by virtue of being in state, and therefore had no incentive to limit their activities to solicitation in order to comply with Pub. L. No. 86-272. Thus, out-of-state businesses engaged in interstate commerce were the only victims of the Department's bait and switch tactics.

Pub. L. No. 86-272 was the proper nexus standard. *See* App. 43-50.

The Department's decision to reverse course in 1993 by retroactively assessing the SBT in the wake of the *Gillette* decision violates principles of fundamental fairness. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court held that in determining whether the retroactive legislative imposition of taxes infringes due process, "it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch*, 305 U.S. at 147. Whether the retroactive application of a tax is "so harsh and oppressive" as to surpass constitutional notions of due process, depends, in part, on notice to the taxpayers. *See United States v. Hemme*, 476 U.S. 558, 569 (1986). Indeed, in the federal context, the Court has condoned the general practice of making federal tax legislation retroactive to the date Congress first begins debating the subject because taxpayers are put on notice that the applicable statute may change. *See United States v. Hudson*, 299 U.S. 498, 500 (1937). In this case, however, the notice from the Department was an assurance from 1980 until 1993 that Pub. L. No. 86-272 was the jurisdictional standard for the SBT until the Michigan Court of Appeals held otherwise *sua sponte*.

The state expected, and encouraged, out-of-state businesses like Topps to rely on its assurances of tax immunity, and Topps and other out-of-state businesses did so. Topps deliberately limited its operations in Michigan in reliance upon the Department's bulletins. *See* App.

88-90 and App. 99.[5] The retroactive application of the *Quill* nexus standard penalized Topps, and over 1,600 similarly situated out-of-state businesses,[6] who relied upon the Department's Bulletins when structuring and operating their businesses and competed against in-state businesses with one hand figuratively tied behind their backs.[7]

Taxpayers who relied upon the Department's assurances were disadvantaged in another way – they were denied deductions available from other states' taxes for

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[5] App. 94-102 is Topps' Complaint in this matter, in which Topps specifically asserted that it relied upon the Department's Bulletins. The trial court granted judgment as a matter of law, finding that the Complaint failed to state a cause of action. Therefore, under Michigan law, the allegations of the Complaint are assumed to be true.

[6] *See* App. 92, which confirms that the Department has contacted over 1,600 out-of-state businesses regarding the retroactive application of the *Quill* nexus standard.

[7] The Department's bulletins induced Topps and similarly situated out-of-state businesses to limit their business activities in Michigan to mere solicitation. The Department's retroactive assessment of tax removed the benefit – the promised tax immunity – and left only the burden – the limited in-state activities. The Court has invalidated attempts by a state to limit and burden the business activities of out-of-state actors by direct regulation. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) (noting the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition" and striking down a Florida statute that prevented out-of-state banks from owning or controlling in-state investment businesses). The Court should likewise invalidate the same result achieved indirectly here through the action of the Department of Treasury.

any SBT paid. *See, e.g., First Chicago NBD Corp. v. Dep't of State Revenue*, 708 N.E.2d 631 (Ind. Tax 1999) (allowing a deduction from Illinois tax for SBT paid); *Kellogg Sales Co. v. Dep't of Revenue*, 10 Or. Tax 480, 1987 WL 18463 (1987) (allowing a deduction from Oregon tax for SBT paid); *In re Appeal of Kelly Services, Inc.*, 1997 WL 466851 (Cal. St. Bd. Eq. May 8, 1997) (allowing a deduction from California franchise tax for SBT paid). Thus, out-of-state taxpayers who relied on the Department's assurances are now required to pay the SBT for years closed under other states' tax refund statutes of limitations, and lose the ability to deduct the SBT they were later forced to pay in Michigan. Such taxpayers are deprived of deductions in other states that Michigan-based multi-state businesses received, because Michigan-based businesses knew they would be liable for SBT.[8]

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[8] Taxpayers like Topps, who filed and paid taxes in other states, also relied on the Department's Bulletins when they apportioned their tax bases to other states. Both the SBT and the Uniform Division of Income Tax Purposes Act ("UDITPA"), 7A U.L.A. 356 (1999), apportion a multi-state taxpayer's tax base to the taxing state depending upon whether the taxpayer is "taxable" in other states. *See* App. 28-34, 36-37. The Department's attempt to retroactively tax a portion of such a taxpayer's business subjects the taxpayer to multiple taxation because the taxpayer has already apportioned 100% of its business to other states in reliance upon the Department's bulletins and the refund claim statute of limitations has long since closed in other states. *See, e.g., Beistle Co. v. Pennsylvania*, 640 A.2d 483 (Pa. Commw. Ct. 1991), *aff'd*, 638 A.2d 943 (Pa. 1994) (holding that a taxpayer was barred by Pennsylvania's two year statute of limitations from filing a refund request due to an error in Pennsylvania apportionment based on the taxpayer's mistaken belief that it was not taxable in New York).

This country's law has harbored a singular distrust of retroactivity. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265-67 (1994) (noting that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."). One reason that retroactivity is disfavored is the risk that the state "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266. In this case, the only businesses adversely affected by the retroactive application of the broader SBT nexus standard were out-of-state businesses – a group about which the state cares little. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 (1944) (noting that the "Court has often recognized that to the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

The state's bait and switch taxation tactics are "arbitrary and irrational" and, as such, fail the standard for substantive due process announced by the Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). There was no debate on the policy behind the retroactive assessment of the SBT following *Gillette*. By way of analogy, the Court has noted that retroactive legislation must meet a burden not faced by prospective legislation – there must be a valid justification for the retroactive application. *See Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723-24, 729 (1984) (noting that Congress carefully

chose the retroactive effective date to prevent the opportunistic withdrawal of employers from benefit plans while Congress debated their liability). In this case, however, the Department has not articulated any reason for retroactive assessment of SBT upon out-of-state taxpayers who relied upon its Bulletins.

The state's decision to change the rules of the game after multi-state businesses played by them for years provides the substantive core of the unconstitutionality of the state action in this case. This substantive core is particularly egregious because of the procedural mechanism the state chose for acting retroactively. Instead of implementing its retroactive tax paradigm through the legislature or the courts, it did so through an administrative agency. The subsequent actions of that agency demonstrate the full magnitude of the due process violation now before the Court.

II. THE STATE'S UNCONSTITUTIONAL "BAIT AND SWITCH" TAXATION TACTICS VIOLATE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS BY RETROACTIVELY DEPRIVING PETITIONER OF PROPERTY THROUGH A SUMMARY AGENCY PROCEDURE THAT NEITHER CONFORMED TO THE TENETS OF ADMINISTRATIVE ADJUDICATION NOR KEPT WITHIN THE CONFINES OF ADMINISTRATIVE RULEMAKING.

Although "[r]etroactivity is generally disfavored in the law, in accordance with 'fundamental notions of

justice' that have been recognized throughout history,"[9] Topps is not arguing that the assessment of the Single Business Tax is unconstitutional merely because it is retroactive. Rather, Topps argues that it is unconstitutional because it was retroactively applied by a state agency contrary to a guideline binding on that agency and without adequate procedural due process protections. The state assessed the SBT on Topps in a Department procedure that was neither a rulemaking nor an adjudication. In denying Topps' challenge below, the Court of Appeals failed to take adequate account of how the requirement of due process applies to non-adjudicative actions by administrative agencies, on the one hand, and lawmaking actions by legislatures and adjudicative actions by courts, on the other.

First, in the context of legislatures, the presumption is that retroactive laws do not violate the Constitution, so long as they clear the minimal hurdles of rational basis review.[10] In *Welch v. Henry, supra,* the Court upheld a statute on the grounds that "a tax is not necessarily unconstitutional because retroactive . . . . " *Welch,* 305

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[9] *Eastern Enterprises v. Apfel,* 524 U.S. 498, 532 (1998) (internal citations omitted).

[10] Topps believes that, in this case, even if the Michigan Legislature had retroactively changed the SBT nexus standard, such an enactment would have been of questionable validity, given that only out-of-state businesses would have been adversely affected, and given the Legislature's thirteen year acquiescence to the Department of Treasury's long-standing assurances of tax immunity. In any event, the Legislature did not enact legislation retroactively changing the nexus standard, so the question is not before the Court.

U.S. at 146-147. This Court has also held that the authority to impose retroactive obligations is not limited to federal legislative activities, but applies, as well, to legislative activities on the state level. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The Court's jurisprudence related to retrospective tax legislation is inapplicable, however, because the retroactive assessment of the tax at issue in this case was accomplished not by an elected legislature, but by a state agency.

The due process presumption for agency action is just the opposite: Unless the agency has explicit legislative empowerment, it is presumed to be constitutionally prohibited from acting retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). In *Bowen*, the Court held that "a statutory grant of legislative rulemaking power will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208. There simply is no such express grant of power in the present case authorizing the Michigan Department of Treasury's retroactive assessment of the Single Business Tax. Indeed, in rejecting Topps' due process challenge, the Michigan Court of Appeals failed to honor this important distinction in legislative versus administrative power. The Michigan Court of Appeals relied on a Third Circuit case that upheld retroactive taxation on the grounds that the vehicle for taxation was a regulation, not a statute. *See Tate & Lyle, Inc. v. Comm'r of Internal Revenue Service*, 87 F.3d 99, 107 (3rd Cir. 1996). The Third Circuit held in *Tate & Lyle* that, "*Carlton*,

[finding a six year retroactive period for a statute unconstitutional], is distinguishable: *Carlton* involved the retroactive application of a statute, and here we are dealing with the retroactive application of a regulation." In so relying, the Michigan Court of Appeals failed to note that the *Tate & Lyle* case *also* involved an explicit statutory grant of retroactive authority – a grant notably absent in the present case. *See Tate & Lyle*, 87 F.3d at 108 ("The retroactivity of [U.S.] treasury regulations is governed by I.R.C. § 7805(b), which states: 'The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to internal revenue laws, shall be applied without retroactive effect.' Clearly Congress has determined that treasury regulations are presumed to apply retroactively. *The extent to which newly promulgated regulations shall not apply retroactively is a matter of discretion left to the secretary.*") (emphasis added). Conversely, because the Michigan Department of Treasury acted retroactively without an affirmative statutory grant of authority, its actions must be presumed to be unconstitutional. Indeed, unlike the federal statute at issue in *Tate & Lyle*, which put the public on notice under the Internal Revenue Code that the Internal Revenue Service could act retroactively, in the state action at issue here, the public was put on notice to the opposite effect – that the Department of Treasury could *not* act retroactively. *See* Revenue Administrative Bulletin 1989-34 (stating that the Department's Bulletins may be relied upon and have the status of precedent *"unless and until revoked or modified."*) (emphasis added). App. 51.

Moreover, principles of political accountability urge different levels of deference for retroactive legislative

action versus retroactive administrative action. The Court gives great deference to an elected legislature engaged in the balancing of competing political interests and a determination of how to allocate the economic burdens required by new legislation. *See e.g., Pension Benefit Guaranty Corp, supra,* 467 U.S. at 729 (noting that the "strong deference accorded legislation in the field of economic policy is no less applicable when that legislation is applied retroactively."). In this case, however, the retroactive imposition of the tax was accomplished by a state agency that has little or no political accountability. The Michigan Legislature did nothing. Nothing, that is, but acquiesce for thirteen years in the Department's pronouncement that Pub. L. No. 86-272 was the correct SBT nexus standard.[11]

Second, in the context of courts, the Michigan Court of Appeals glossed over important distinctions between typical adjudicative actions and the actions taken by the Department against Topps and similarly situated businesses. Any adjudicative action is, by definition, retroactive, at least to the parties to the proceeding. In Topps' case, however, the challenged retroactive effect is not from a decision of a *court*, it is from the action of an *agency*. In the case below, the Court of Appeals merely

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[11] Under Michigan law, the Legislature is presumed to know of the agency's construction of a statute. "[L]egislative silence in the face of an agency's construction of a statute 'can only be construed as consent to the accuracy of that interpretation.' " *Dykstra v. Dep't of Natural Resources,* 499 N.W.2d 367, 371 (Mich. Ct. App. 1993) (citing *Luttrell v. Dep't of Corrections,* 365 N.W.2d 74 (Mich. 1984) quoting *Magreta v. Ambassador Steel Co. (on rehearing),* 158 N.W.2d 473 (Mich. 1968)).

upheld a retroactive assessment action already taken by the state's Department of Treasury. *See* App. 1-4. While the Department based this action on the Michigan Court of Appeals' 1993 *Gillette* decision, which replaced the narrow Pub. L. No. 86-272 nexus standard with the broad *Quill* nexus standard, the *Gillette* decision affected, on its face, only the Gillette Company itself, and perhaps, other cases pending at the time. Topps did not have a case or matter pending at the time of the *Gillette* decision. The *Gillette* decision did not become retroactive to other out-of-state businesses, like Topps, until the Department began attempts to collect taxes on previously immune activities.

These collection attempts violated the due process rights of Topps and similarly situated out-of-state taxpayers for three reasons. First, the Department pursued Topps, and similarly situated taxpayers under the new *Quill* standard even though it was bound under Michigan law to adhere to the old Pub. L. No. 86-272 standard. *See* Single Business Tax Bulletin 1980-1 App. 38-42, Revenue Administrative Bulletin 1989-46, App. 43-50. *See also* MICH. COMP. LAWS § 24.203(6) (1979), App. 20-21, which renders these Bulletins binding on the agency that promulgates them, thus precluding the very retroactivity to which Topps was subjected.

Second, as already noted, even if this assessment could somehow be viewed as an otherwise valid rulemaking, the Department lacked the requisite statutory grant of authority to retroactively assess taxes through such rulemaking. In the absence of such a grant, the agency could only retroactively deprive Topps of property through a proper adjudication.

Finally, the Department retroactively altered Topps' rights and obligations *without* a proper adjudication. As a preliminary matter, while the Department is authorized to promulgate rules[12] and issue bulletins,[13] it has no authority under either the Single Business Tax Act or its organic statute to conduct adjudications. And, even if it did, the procedure used in this case could hardly be called an "adjudication." The mechanism the Department used to retroactively tax Topps was an audit conducted at the taxpayer's New York office. The auditors were under instruction to retroactively impose the SBT for all fiscal years on or after January 1, 1989 under *Quill* even though the years predate *Gillette*. The Department finally reduced this decision to writing in 1998. *See* App. 56-70 (showing the Department's 1998-1 Bulletin announcing that the *Quill* nexus standard applies retroactively to tax years ending 1989).[14] This kind of broad-scale determination

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[12] *See* MICH. COMP. LAWS § 208.80(2). App. 34-35.

[13] *See* MICH. COMP. LAWS § 205.3(f). App. 24.

[14] Following the Department's audit, Topps availed itself of an "Informal Conference" conducted by a "Referee," as provided by the Michigan Department of Revenue Act. An Informal Conference is not an adjudication under the Michigan Administrative Procedures Act ("MAPA"). Under MAPA, an adjudication before an agency is called a "contested case." *See* MICH. COMP. LAWS § 24.203(3), App. 20. In order for a procedure to be a "contested case," it must include an "evidentiary hearing." *See id.* The Department's summary Informal Conference involves no evidentiary hearing, is not covered by MAPA, allows no cross-examination of witnesses, and is not on the record. In short, under every benchmark of administrative law, the Department's Informal Conference is *not* an adjudication. In any event, the Informal Conference result was predestined by administrative fiat. The Department had already

of rights and obligations by an administrative agency, without either proper hearing procedures for an adjudication, or an express statutory grant of retroactive authority for a rulemaking, deprives out-of-state taxpayers like Topps of property without due process of law. And Topps was not the only out-of-state taxpayer affected by the arbitrary and capricious actions of the Michigan Department of Treasury.

III. THE STATE'S "BAIT AND SWITCH" TAXATION TACTICS HAVE WIDE-RANGING NEGATIVE EFFECTS ON OUT-OF-STATE BUSINESSES, WHICH MAY ONLY BE RECTIFIED BY THIS COURT.

The Department subjected over 1,600 out-of-state businesses to its bait and switch tactics. *See* App. 92. While it is true that the Court does not function to merely correct misunderstandings of law by courts below, the wide-ranging impact of the Michigan bait and switch commends this case to the Court for its consideration. Moreover, it is not just the mere number of injuries, but their severity, that makes Topps' case worthy of the Court's attention. The Michigan courts have been uniformly unwilling to constrain the Department by adherence to the principles of due process that typically apply to administrative action.[15]

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decided to retroactively assess the Single Business Tax under the *Quill* standard against all out-of-state taxpayers.

[15] *See, e.g., Gillette, supra, Syntex Lab. v. Dep't of Treasury*, 590 N.W.2d 612 (Mich. Ct. App. 1998), *lv. den.*, 607 N.W.2d 726 (Mich. 2000), *Cosmair, Inc. v. Michigan Dep't of Treasury*, No.

In considering this matter for certiorari, the urgent question for the Court to consider is "what if every state considered itself free to do what Michigan has done?" The answer, of course, is that if other states acted in the manner that Michigan has, not only would there be wide-scale deprivation of due process rights, there would be wide-ranging disturbance in the stream of interstate commerce.[16] Any business considering whether to engage in interstate commerce must structure its business activities to comply with, and plan for, the tax laws of the states in which it is considering entering. Out-of-state businesses, like Topps, when considering whether to engage in interstate commerce in Michigan, would have consulted the Department's bulletins concerning nexus as well as the Michigan statutes granting the Department authority to promulgate those bulletins, and would have structured their activities accordingly. The Department's actions in

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198240 (Mich. Ct. App. 1998), *Superior Indus., Inc. v. Dep't of Treasury*, No. 230853, 1998 WL 213228 (Mich. Tax Trib. Jan. 12, 1998).

[16] When determining whether state legislation runs afoul of the Constitution, the Court has held that "the practical effect of [the challenged legislation] must be evaluated, not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation." *See Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). The Michigan Department of Treasury's action should be similarly analyzed by examining the "practical effect" of the action – considering the consequences of the action itself as well as how the Department's action interacts "with the legitimate regulatory regimes of the other States" and what effect would arise if other States engaged in similar actions.

retroactively assessing tax on interstate taxpayers (and the actions of the Michigan courts in allowing such retroactive assessments) have defeated the settled expectations of interstate taxpayers and, if engaged in by other states, would lead to chaos in interstate commerce.

CONCLUSION

Multistate businesses like Topps face a significant challenge. They must comply with the laws, including tax laws, in every jurisdiction in which they transact business. In determining what laws apply and how to comply with those laws, Topps consulted Michigan statutes giving the Michigan Department of Treasury the authority to issue Bulletins binding on the agency that promulgates them. In consulting those Bulletins, Topps was assured that the promulgating agency had the authority to issue the Bulletin; that the Bulletin was issued to provide guidance; that the Bulletin was binding on the agency; that it could be relied upon; that it had the value of precedent; and that it would not be retroactively revoked. Notwithstanding all of this, the Department retroactively assessed the SBT on Topps and similarly situated businesses.

Chaos and uncertainty will reign in the national marketplace unless the Court determines that such circumstances violate the Due Process Clause of the Fourteenth Amendment. State agencies, in this case the Michigan Department of Treasury, must adhere to their repeated assurances that the legal effect of conduct engaged in by a multistate business will be assessed under the law that existed when the conduct took place, not under radically

different legal principles not in force when the conduct occurred. Unless the lower court decision is remedied by the Court, each state will be given a green light to retroactively convert any highway of the national marketplace into a toll road after the trip has ended, the car is parked, and the engine is cold.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

THE TOPPS COMPANY, INC.,

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.
_____/

File No. 96-16324-CM

Hon. Thomas L. Brown

OPINION AND ORDER

This matter is before the Court on the Defendant Michigan Department of Treasury's (MDOT's) motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has filed suit in an effort to recover single business taxes (SBT) paid under protest pursuant to a final assessment issued by Defendant. At issue is whether the Due Process/Commerce clause nexus test as first set forth in *Gillette v Dep't of Treasury*, 198 Mich App 303; NW2d (1993), *lv den*, 445 Mich 861 (1994) may be retroactively applied to Plaintiff and if so, whether a sufficient nexus existed between Plaintiff and the State of Michigan so as to require Plaintiff to pay SBT for the tax years in question.

Plaintiff, a Delaware Corporation with is principal office located in Near York, manufactures a product line consisting of picture products, gum, candy, and confection toys in Pennsylvania. Plaintiff employs two full-time

sales representatives who live in Michigan and call upon customers in Michigan as well as three other states. The two sales representatives solicit orders and forward the order to New York for approval. For the years at issue, Plaintiff conducted sales in Michigan ranging from $10,303,571 to $13,683,232 per year. During the same years, Plaintiff's Michigan payroll varied from $89,608 to $112,023. Finally, during the years at issue, Plaintiff's property located in Michigan ranged from $72,832 to $118,464. Plaintiff does not maintain a Michigan office, mailing address, or telephone listing.

In determining whether Plaintiff had sufficient contacts with the State of Michigan to allow the imposition of the SBT for the tax years in question, Defendant argues that the Due Process/Commerce Clause nexus standard as set forth in *Gillette, supra,* and subsequently applied by the Court of Appeals in other cases should be retroactively applied to the instant case. Specifically, Defendant argues that the principle of *stare decisis* compels this Court to apply *Gillette* retroactively. Plaintiff argues that while the Court of Appeals has applied the new nexus standard retroactively, the Court of Appeals has yet to address the merits of the retroactive application of the Due Process/Commerce Clause nexus test.

In *Gillette,* the Court of Appeals retroactively applied the Due Process/Commerce clause nexus standard. Although not raised by the parties in *Gillette,* the Court of Appeals *sui sponte* ruled that the nexus standard as set forth in 15 U.S.C. 381 (Public Law 86-272) was not the appropriate test for determining whether or not a company doing business in Michigan was subject to Michigan's SBT. In its motion for rehearing, Gillette argued that

the retroactive application of the new nexus standard was unconstitutional and contrary to Michigan case law. The Court of Appeals denied Gillette's motion for rehearing.

Plaintiff correctly states that a denial of a rehearing is not necessarily determinative of the merits presented by an application for rehearing. *Metro Homes Inc.* v *City of Warren*, 19 Mich App 664; 173 NW2d 230 (1969). However, although no written Court of Appeals decision has expressly addressed whether or not the Due Process/ Commerce Clause nexus standard should be retroactively applied, implicit in *Gillette* and the subsequent case law applying Gillette is the determination that the retroactive application of the new nexus standard is both constitional and consistant with Michigan case law. Accordingly, based upon the principle of *stare decisis*, this Court is bound to follow *Gillette* and, therefore, retroactively apply the new nexus standard to the instant case. MCR 7.215(C)(2).

Applying the Due Process/Commerce Clause nexus test to the instant case, the undisputed facts clearly show that Plaintiff had sufficient contacts with the State of Michigan to impose the SBT for the years in question. The activity of Plaintiff's two Michigan-based sales representatives constitute sufficient nexus with the State of Michigan to allow Plaintiff to be taxed for its business activity in Michigan. *MagneTek Controls, Inc.* v *Dep't of Treasury*, Court of Appeals Docket No. 181612, ___Mich App___; ___NW2d___ (1997).

Therefore, IT IS HEREBY ORDERED that Defendant's motion for summary disposition is GRANTED pursuant MCR 2.116 (C) (8).

Date: 4-15-97

/s/ Thomas L. Brown
Thomas L. Brown,
Circuit Judge

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

STATE Of MICHIGAN
IN THE COURT OF CLAIMS

THE TOPPS COMPANY, INC.,

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.
_____/

File No. 96-16324-CM

Hon. Thomas L. Brown

OPINION AND ORDER

This matter is before the Court on Plaintiff's motion for reconsideration pursuant to MCR 2.119(F). Plaintiff seeks reconsideration of an Opinion and Order dated April 15, 1997 in which this Court ruled that the Court of Appeals in *Gillette* v *Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), *lv den*, 445 Mich 861 (1994) has already ruled upon the constitutionality of the retroactive application of the Due Process /Commerce Clause nexus standard and, therefore, that the *Gillette* ruling constitutes binding precedent which this Court is obligated to follow.

In *Gillette*, the Court of Appeals *sui sponte* ruled that the nexus standard as set forth in 15 U.S.C. 381 (Public Law 86-272) was not the appropriate test for determining whether or not a company doing business in Michigan was subject to Michigan's single business tax (SBT). Gillette filed a motion for rehearing in which Gillette argued that the retroactive application of the new nexus standard

was unconstitutional and contrary to Michigan case law. The Court of Appeals denied Gillette's motion for rehearing. The Michigan Supreme Court denied Gillette's application for leave to appeal as well as Gillette's subsequent motion for reconsideration. Relying upon *Metro Homes Inc* v *City of Warren*, 19 Mich App 664; 173 NW2d 230 (1969), Plaintiff argues that the denial of rehearing by the Court of Appeals in the *Gillette* case is not determinative of the merits of the constitutionality of the retroactive application of the new nexus test. Further, Plaintiff cites *Alujni* v *West Bloomfield Sch Dist*, 397 Mich 462, 465; 245 NW2d 49 (1976) for the proposition that "a point thus assumed without consideration is of course not decided." Plaintiff also cites *Bostrom* v *Jennings*, 326 Mich 146, 156; 40 NW 97 (1949) which states that "[W]hen a question necessarily involved in a case and answered by [a] holding was neither considered by the Court nor discussed in [the] opinion, the answer thus arrived at is not binding as precedent."

In *Gillette*, the Court of Appeals *sui sponte* ruled that the nexus standards as set forth in 15 U.S.C. 381 was the inappropriate nexus test for purposes of Michigan's SBT. While the *Gillette* Court did not discuss the constitutional issue in its written opinion, the Court finds it highly unlikely that the Court of Appeals failed to consider the constitutional ramifications of its decision in light of the fact that it was the Court of Appeals itself that raised the issue of the proper nexus standard. While a denial of rehearing by the Court of Appeals is not determinative of the merits, the Court finds that the denial of rehearing under these circumstances lends credence to the finding that the Court of Appeals did in fact previously consider

the issue of the constitutionality of the retroactive application of its decision. Nonetheless, *to the extent that the Gillette* Court of Appeals decision is not binding precedent under the above-cited case law dealing with the application of the principle of *stare decisis,* the Court finds that the application of the Due Process/Commerce Clause nexus standard to Plaintiff does not violate Plaintiff's due process rights.

Therefore, IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration is DENIED.

Date: 5-5-97

/s/ Thomas L. Brown
Thomas L. Brown,
Court of Claims Judge

STATE OF MICHIGAN

COURT OF APPEALS

TOPPS COMPANY, INC, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	UNPUBLISHED June 11, 1999 No. 203495 Court of Claims LC No. 96-016324 CM

Before: Smolenski P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals by right a Court of Claims order denying its motion for reconsideration of an order granting defendant's motion for summary disposition. We affirm.

I

Prior to 1993, the Department of Treasury did not assess taxes under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.*, unless the taxpayer's business activities had a sufficient nexus with the state of Michigan pursuant to PL 86-272, codified at 15 USC 381. *Syntex Laboratories v Dep't of Treasury,* 233 Mich App 286, 288; ___ NW2d ___ (1998). In *Gillette Co v. Dep't of Treasury,* 198 Mich App 303; 497 NW2d 595 (1993), this Court held that PL 86-272 did not apply to taxes imposed under the SBTA, and that the proper test is the Due Process/Commerce Clause test set forth in *Quill Corp v. North Dakota,* 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91

(1992). In accordance with the *Gillette* decision, defendant determined that plaintiff was liable for the SBT for fiscal years 1990-1993.[1] Defendant paid the assessment under protest, but filed a complaint in the Court of Claims for return of the money. Applying *Gillette* retroactively, the Court of Claims granted defendant's motion for summary disposition. Plaintiff now appeals.

II

Plaintiff argues that the trial court erroneously gave retroactive application to this Court's 1993 decision. This Court has already held that *Gillette* is properly applied retroactively. *Syntex, supra,* 233 Mich App 292-293.

III

Plaintiff further argues that defendant should be estopped from collecting past single business taxes. We disagree.

Estoppel arises when "a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Westfield Companies v Grand Valley Health Plan,* 224 Mich App 385, 390-391; 568 NW2d 854 (1997). Here, plaintiff paid taxes under the

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[1] Plaintiff paid the SBT in 1990 and 1991, though it later sought return of that money.

SBTA in fiscal years 1990 and 1991, *before* Michigan collected this tax from businesses in plaintiff's circumstances. Accordingly, plaintiff cannot now argue reliance on defendant's prior position. Additionally, defendant never misrepresented *facts*; rather it asserted a legal position that was subsequently deemed contrary to Michigan law. Furthermore, defendant's representation of the law was neither intentional nor negligent. Rather, its position was based on a good-faith understanding of Michigan law. See *Adams v. Detroit*, 232 Mich App 701, 708; ___ NW2d ___ (1998), holding that "[e]quitable estoppel arises where one party has *knowingly concealed* or *falsely represented* a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position."

Additionally, estoppel is inapplicable because defendant did not change its position regarding plaintiff's immunity from taxation under the SBTA, but rather was required by this Court to change its policy. Defendant's reliance on *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), is misplaced. In *D'Amico*, the Treasury Department first changed its position, and later had its change endorsed by the courts. *Id.*, 559 n 11. Thus, the Department changed its position *before being required to do so* pursuant to a court order. *Id.*, 564. Conversely, in this case, defendant changed its position only *after it was forced to do so* by an order of this Court. *Gillette, supra*, 198 Mich App 311. Estoppel therefore does not apply.

IV

Finally, plaintiff contends that defendant's retroactive application of the due process/commerce clause test violates plaintiff's constitutional rights under the Due Process Clause, US Const, Am V, XIV. We disagree.

The Supreme Court has held that retroactive application of a tax does not violate due process simply because taxable events transpired before the taxing statute was passed. In *Welch v Henry*, 305 US 134; 59 S Ct 121; 83 L Ed 87 (1938), the Supreme Court stated:

> [t]he objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. . . . Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Welch, supra*, 305 US 146-147 (citations omitted).]

More recently, the United States Supreme Court held in *United States v Carlton*, 512 US 26; 129 L Ed 2d 22; 114 S Ct 2018 (1994), that a retroactive amendment to a tax statute did not violate due process where the retroactive period was of reasonable length (slightly more than one year) and where the government's purpose was neither

illegitimate nor arbitrary. *Id.*, 32-33. In *Carlton*, the executor of a decedent's estate challenged an amendment which restricted the availability of an estate tax deduction. The executor of a decedent's estate had engaged in a particular transaction for the sole purpose of taking advantage of the deduction. *Id.*, 28-29. The Court rejected the executor's due process argument, noting that there was "no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage" in the transactions at issue. *Id.*, 32. The Court further noted that the executor's reliance, by itself, was insufficient to establish a constitutional violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.*, 33. Finally, the Court stated that the executor's lack of notice regarding the amendment was not dispositive because "a taxpayer 'should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation.' " *Id.*, 34, quoting *Milliken v United States*, 283 US 15, 23; 51 S Ct 324, 75 L Ed 809 (1931).

Relying on *Carlton*, the Third Circuit held in *Tate & Lyle, Inc v Commissioner of Internal Revenue Service*, 87 F3d 99 (CA 3, 1996), that a retroactive application of a tax *regulation* did not violate the Due Process Clause although the six-year retroactive application period was longer than that contemplated by *Carlton*. *Id.*, 107. The Court found that *Carlton* was distinguishable because "*Carlton* involved the retroactive application of a *statute*, and here we are dealing with the retroactive application of a *regulation*." *Id.* (emphasis in original).

In the case before us, we find no basis for plaintiff's contention that the retroactive application of *Gillette* violated due process. There is no indication that defendant's conduct in collecting back SBTA taxes was arbitrary or capricious. Additionally, the circumstances here present a less compelling case against retroactive application. *Carlton* involved retroactive application of a statutory amendment; *Tate & Lyle*, a regulation. Here, the SBTA has been in existence throughout the relevant period; only the interpretation of that statute is being applied retroactively. Accordingly, we find no due process violation in the retroactive application of *Gillette*, notwithstanding lack of notice or plaintiff's alleged reliance.

Plaintiff's arguments to the contrary are unpersuasive. Plaintiff cites *Welch, supra*, 305 US 134, and *United States v Hemme*, 476 US 558; 106 S Ct 2071; 90 L Ed 2d 538 (1986), and then states that

> [c]learly, Topps could not have altered its behavior to avoid incurring SBT under the *Gillette* jurisdictional standard because it could not have anticipated application of the *Gillette* standard prior to *Gillette*. Second, tax should not be retroactively applied if the taxpayer did not have notice of the tax when the taxpayer engaged in the transaction.

Plaintiff refers to a "transaction" because it relies on a case involving gift taxes, wherein a specific gift was made and taxed two years later on the death of the donor. *Hemme, supra*, 476 US 563. The United States Supreme Court has made clear that the analysis applicable to gift taxes, which might affect vested rights, is not the same

analysis to be applied to other taxes, which generally do not affect vested rights:

> In the cases in which [the Supreme] Court has held invalid the *taxation of gifts* made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. [*Welch, supra,* 305 US 147 (emphasis added).]

The case at bar does not involve a gift tax; therefore, plaintiff's reliance on the *Hemme* case is misplaced.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

Order
Entered: May 5, 2000

115012 & (44)

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

TOPPS COMPANY, INC.,

Plaintiff-Appellant,

v

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 115012
COA: 203495
Court of Claims:
96-016324-CM

On order of the Court, the motion to appear as amicus curiae is considered, and it is GRANTED. The application for leave to appeal from the June 11, 1999 decision of the Court of Appeals also is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Weaver, C.J., would grant leave to appeal.

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[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 5, 2000

/s/ Jacqueline B. MacKinnon
Deputy Clerk

U.S. Const. Art. 1

§ 8. Powers of Congress

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Const. AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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15 U.S.C. § 381. Imposition of net income tax

- (a) Minimum standards

  No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

  - (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

    (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

- (b) Domestic corporations; persons domiciled in or residents of a State

  The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

  - (1) any corporation which is incorporated under the laws of such State; or

  - (2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

- (c) Sales or solicitation or orders for sales by independent contractors
  For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or tangible personal property.

- (d) Definitions
  For purposes of this section –

  - (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

    (2) the term "representatvie" does not include an independent contractor.

Michigan Compiled Laws

24.203 Definitions; A to G.

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Complied Law's or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a names party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as through before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Guideline" means an agency statement of declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

205.1 Revenue division of the department of treasury of the state; creation.

Sec. 1. A tax collection agency is created, to be known as the revenue division of the department of treasury of the state, for the following purposes:

(a) Coordinated collection of such state taxes, assessments, licenses, fees and other moneys as may be designated by law, either herein or hereafter.

(b) Specialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return and payment.

(c) Avoidance of duplication in state facilities for tax collections that involve seasonal or occasional increases of staff, duplication of audits and wasteful travel expenses.

(d) Safeguarding tax and other collections wherever received until duly deposited in the state treasury.

(e) Providing an advisory service on fiscal status, processes and needs of state government, including periodic reports on payments, receipts and debts.

(f) Development of a state revenue enforcement service by means of a staff that is permanent, qualified by

training and experience, protected by merit system procedure, and so organized as to serve the public with efficiency, economy, consistency and equity.

Any reference to the department of revenue in this act or any other act shall mean the revenue division of the department treasury.

205.3 State commission of revenue; powers and duties generally.

Sec. 3. The commissioner shall have all the powers and perform the duties formerly vested in any department, board, commission, or other agency, in connection with taxes due to or claimed by the state and in connection with unpaid accounts or amounts due to the state or any of its departments, institutions, or agencies which may be made payable to or collectible by the department created by this act, and the power and authority incidental to the performance of the following acts, duties, and services:

(a) The commissioner or any of the duly appointed agents of the commissioner may examine the books, records, and papers touching the matter at issue of any person or taxpayer subject to any tax, unpaid account, or amount the collection of which is charged to the department. The commissioner or any of the duly appointed agents of the commissioner may issue a subpoena requiring a person to appear and be examined with reference to a matter within the scope of the inquiry or investigation being conducted by the department and to produce any

books, records, or papers. The commissioner or any of the duly appointed agents, referees, or examiners of the commissioner, may administer an oath to a witness in any matter before the department. The department may invoke the aid of the circuit court of this state in requiring the attendance and testimony of witnesses and the producing of books, papers, and documents. The circuit court of the state within the jurisdiction of which an inquiry is carried on, in case of contumacy or refusal to obey a subpoena, may issue an order requiring the person to appear before the department and produce books and papers if so ordered and any evidence touching the matter in question, and failure to obey the order of the court may be punished by the court as a contempt. A person shall not be excused from testifying or from producing any books, papers, records, or memoranda in any investigation, or upon any hearing when ordered to do so by the commissioner, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate or subject him or her to a criminal penalty, however, a person shall not be prosecuted or subject to any criminal penalty for or on account of any transaction made or thing concerning which he or she may testify or produce evidence, documentary or otherwise, before the board or its agent. A person so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying.

(b) After reasonable notice and public hearing to promulgate rules consistent with this act in accordance with Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, as may be necessary to the enforcement of the

provisions of tax and other revenue measures which are administered by the commissioner.

(c) Consult with the governor and the legislature upon the subject of taxation, revenue, and the administration of the laws in relation to taxation and revenue, and the progress of the work of the department, including the furnishing of reports, information, and other assistance as the governor may require.

(d) Investigate and study all matters of taxation and revenue as the basis of recommending to the governor and the legislature those changes and alterations in the tax laws of the state as in the commissioner's judgment may bring about a more adequate and just system of state and local taxation.

(e) Formulate a standard procedure whereby the departments, commissions, boards, institutions, and the agencies of the state which collect taxes, fees, or accounts for the state shall report all sums of money due and uncollected and those uncollected items as may be prescribed by law and by the commissioner. The procedure prescribed in this subdivision shall include a standard practice for receiving, receipting, safeguarding, and periodically reporting all state revenue receipts, whether current, delinquent, penalty, interest, or otherwise, and the amounts, kinds, and terms of items either collected, compromised, or still outstanding, to be summarized, studied, and reported upon as the commissioner considers advisable.

(f) The department may periodically issue bulletins that index and explain current department interpretations of current state tax laws. The department may charge a

reasonable fee for subscriptions to this service not to exceed the cost of printing. The money received from the sale of such subscription shall revert to the department and be placed in the taxation manual revolving fund.

205.21 Failure or refusal to make return or payment; obtaining information on which to base assessment; procedure; frivolous protest; penalty.

Sec. 21. (1) If a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due, the department may obtain information on which to base an assessment of the tax. By its duly authorized agents, the department may examine the books, records, and papers and audit the accounts of a person or any other records pertaining to the tax.

(2) In carrying out this section, the department and the taxpayer shall comply with the following procedure:

(a) The department shall send to the taxpayer a letter of inquiry stating, in a courteous and unintimidating manner, the department's opinion that the taxpayer needs to furnish further information or owes taxes to the state, and the reason for that opinion. A letter of inquiry shall also explain the procedure by which the person may initiate communication with the department to resolve any dispute. This subdivision does not apply in any of the following circumstances:

(*i*) The taxpayer files a return showing a tax due and fails to pay that tax.

(*ii*) The deficiency resulted from an audit of the taxpayer's books and records by this state.

(*iii*) The taxpayer otherwise affirmatively admits that a tax is due and owing.

(b) If the dispute is not resolved within 30 days after the department sends the taxpayer a letter of inquiry or if a letter of inquiry is not required pursuant to subdivision (a), the department, after determining the amount of tax due from a taxpayer, shall give notice to the taxpayer of its intent to assess the tax. The notice shall include the amount of the tax the department believes the taxpayer owes, the reason for that deficiency, and a statement advising the taxpayer of a right to an informal conference, the requirement of a written request by the taxpayer for the informal conference that includes the taxpayer's statement of the contested amounts and an explanation of the dispute, and the 30-day time limit for that request.

(c) If the taxpayer serves written notice upon the department within 30 days after the taxpayer receives a notice of intent to assess, remits the uncontested portion of the liability, and provides a statement of the contested amounts and an explanation of the dispute, the taxpayer is entitled to an informal conference on the question of liability for the assessment.

(d) Upon receipt of a taxpayer's written notice, the department shall set a mutually agreed upon or reasonable time and place for the informal conference and shall give the taxpayer reasonable written notice not less than 20 days before the informal conference. The notice shall specify the intent to assess, type of tax, and tax year that

is the subject of the informal conference. The informal conference provided for by this subdivision is not subject to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, but is subject to the rules governing informal conferences as promulgated by the department in accordance with Act No. 306 of the Public Acts of 1969. The taxpayer may appear or be represented by any person before the department at an informal conference, and may present testimony and argument. At the party's own expense and with advance notice to the other party, a taxpayer or the department, or both, may make an audio recording of an informal conference.

(e) After the informal conference, the commissioner shall render a decision and order in writing, setting forth the reasons and authority, and shall assess the tax, interest, and penalty found to be due and payable. The decision and order are limited to the subject of the informal conference as included in the notice under subdivision (d).

(f) If the taxpayer does not protest the notice of intent to assess within the time provided in subdivision (c), the department may assess the tax and the interest and penalty on the tax that the department believes are due and payable. An assessment under this subdivision or subdivision (e) is final and subject to appeal as provided in section 22. The final notice of assessment shall include a statement advising the person of a right to appeal.

(3) If a protest to the notice of intent to assess the tax is determined by the commissioner to be a frivolous protest or a desire by the taxpayer to delay or impede the administration of taxes administered under this act, a penalty of $25.00 or 25% of the amount of tax under protest, whichever is greater, shall be added to the tax.

208.41 Apportionment of tax base; business activities taxable within and without state.

***** 208.41 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WHICH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 41. A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.

208.42 Conditions to taxpayer being taxable in another state.

***** 208.42 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY I OF THE YEAR IN WHICH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 42. For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to

a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not.

208.45 Apportionment of tax base to state.

***** 208.45 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WITCH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 45. (1) For tax years beginning before January 1, 1991, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

(2) For tax years beginning after December 31, 1990 and before January 1, 1993, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 30%.

(b) The payroll factor multiplied by 30%.

(c) The sales factor multiplied by 40%.

(3) Subsection (2) does not apply for a tax year in which a deduction is not allowed under section 23(c).

(4) For tax years beginning after December 31, 1992 and before January 1, 1997 and for tax years beginning after December 31, 1996 and before January 1, 1998 if section 23(e) is not in effect, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 25%.

(b) The payroll factor multiplied by 25%.

(c) The sales factor multiplied by 50%.

(5) Except as provided in subsections (4) and (7) and for tax years beginning after December 31, 1996 and before January 1, 1999, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 10%.

(b) The payroll factor multiplied by 10%.

(c) The sales factor multiplied by 80%.

(6) For tax years beginning after December 31, 1998, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state as provided in section 45a.

(7) For tax years beginning after December 31, 1997 and before January 1, 1999 if section 23(e) is not in effect, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 20%.

(b) The payroll factor multiplied by 20%.

(c) The sales factor multiplied by 60%.

(8) For purposes of this section, a taxpayer that has a 52- or 53-week tax year beginning not more than 7 days before December 31 of any year is considered to have a tax year beginning after December 31 of that year.

208.45a Apportionment of tax base.

***** 208.45a THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WHICH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 45a. (1) Except as provided in subsection (2) and for tax years beginning after December 31, 1998, all of the

tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 5%.

(b) The payroll factor multiplied by 5%.

(c) The sales factor multiplied by 90%.

(2) For tax years beginning after December 31, 1998 and before January 1, 2000 if section 23(e) is not in effect, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 15%.

(b) The payroll factor multiplied by 15%.

(c) The sales factor multiplied by 70%.

(3) For purposes of this section, a taxpayer that has a 52- or 53-week tax year beginning not more than 7 days before December 31 of any year is considered to have a tax year beginning after December 31 of that year.

208.51 Sales factor.

***** 208.51 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WHICH THE TAX

RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 51. (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

(2) For a foreign person, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer in the United States during the tax year.

208.52 Sales of tangible personal property in state; circumstances.

***** 208.52 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WHICH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% ******

Sec. 52. Sales of tangible personal property are in this state in any of the following circumstances:

(a) For tax years beginning before January 1, 1998, the property is shipped or delivered to a purchaser, other than the United States government, within this state regardless of the free on board point or other conditions of the sales.

(b) For tax years beginning on and after January 1, 1998, the property is shipped or delivered to any purchaser within this state regardless of the free on board point or other conditions of the sales.

(c) For tax years beginning before January 1, 1998, the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the purchaser is the United States government, or the taxpayer is not taxable in the state of the purchaser. For the purposes of this subdivision only, "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or political subdivision thereof.

208.80 Administration of tax; conflicting provisions; rules; forms; tax cumulative; disposition of proceeds; statistics.

* * * * 208.80 THIS SECTION IS REPEALED BY ACT 115 of 1999 EFFECTIVE ON THE JANUARY 1 OF THE YEAR IN WHICH THE TAX RATE UNDER MCL § 208.31 IS REDUCED TO 0.0% * * * *

Sec. 80. (1) The tax imposed by this act shall be administered by the revenue commissioner pursuant to Act No. 122 of the Public Acts of 1941, being sections 205.1 to 205.30 of the Michigan Compiled Laws, and this act. In case of conflict between Act No. 122 of the Public Acts of 1941 and this act, the provisions of this act will apply.

(2) Rules shall be promulgated under this act pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) The department shall prescribe forms for use by taxpayers and shall promulgate rules in conformity with this act for the maintenance by taxpayers of records, books, and accounts, and for the computation of the tax, the manner and time of changing or electing accounting methods and of exercising the various options contained in this act, the making of returns, and the ascertainment, assessment, and collection of the tax imposed under this act.

(4) The tax imposed by this act is in addition to all other taxes for which the taxpayer may be liable. The proceeds derived from the tax shall be credited to the general fund of the state to be allocated and distributed as provided by this act.

(5) The department shall prepare and publish statistics from the records kept to administer the tax imposed by this act, detailing the distribution of tax receipts by type of business, legal form of organization, sources of tax base, timing of tax receipts, and types of deductions. The statistics shall not result in the disclosure of information regarding any specific taxpayer.

Uniform Division of Income for Tax Purposes Act

§ 2. [Taxpayers Liable].

Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Act.

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§ 3. [Tax Liability in Other State].

For purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

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§ 9. [Allocation of Business Income].

All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

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§ 15. [Sales Factor].

The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

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§ 16. [Situs of Sales of Tangible Personal Property].

Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f. o. b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

[LOGO]

WILLIAM G. MILLIKEN, Governor
LOREN E. MONROE, State Treasurer

STATE OF MICHIGAN

DEPARTMENT OF TREASURY

TREASURY BUILDING

LANSING, MICHIGAN 48922

SINGLE BUSINESS TAX BULLETIN 1980-1

JURISDICTIONAL STANDARD
MAY 1, 1980

Sec. 41. "A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter."

Sec. 42. "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an affect on the jurisdiction position:

Stockler vs Department of Treasury, 75 Mich App 649 (1977)

Complete Auto Transit, Inc. vs Brady, 430 U.S. 274 (1977)

Association of Washington Stevedoring Companies, 98 S. Ct. 1388 (1978)

Sec. 31(4). "The tax so levied and imposed is upon the privilege of doing business and not upon income."

In Stockler, the court indicated:

"We do not perceive the SBT as an income tax. Although federal taxable income is used as the starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, e.g., wages, include expenses incurred, a theory not synonomous with income taxes."

In Complete Auto and Washington Stevedoring, the court ruled a state tax on "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

(1) There is substantial nexus with the taxing state.

(2) The activity within and without the state is fairly apportioned.

(3) Does not discriminate against interstate activity.

(4) It is fairly related to the services provided by the state.

NEXUS

In arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272 as a guide.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established.

Specifically, the following activities will subject out-of-Michigan persons (including corporations) to the SBT:

(1) A business physically located in Michigan. A physical location includes property owned or rented or an office maintained in a salesperson's home in which the company has a telephone listing in the company name.

(2) The ownership or rental of property used in a business activity.

(3) Services rendered to a purchaser, such as inventories, rotation of stock, building of counter displays, technical assistance in the techniques of using the product.

(4) The ownership of stock on consignment or in public warehouses, a portion of which is committed to the Michigan market.

(5) The authority to accept orders.

(6) The exchange of damaged merchandise or warranty assistance.

(7) Conduct credit checks and/or collect delinquent accounts.

(8) The negotiation of complaints or problem accounts.

(9) Performance of a contract.

(10) Performance of service

APPORTIONMENT

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan is subject to when conducting a business activity within this state, whether or not a return is filed in the foreign state.

When a taxpayer has minimal contact with a state in which the taxpayer is apportioning and by apportioning is avoiding taxation in another, the Department will so advise the foreign state under the provision of Section 103.

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act

> to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to obtain a written statement from the foreign state identifying the taxpayer and specific activity conducted which would subject the taxpayer to their jurisdiction.

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
TREASURY BUILDING
LANSING, MICHIGAN 48922

[Names Omitted In Printing]

REVENUE ADMINISTRATIVE BULLETIN 1989-46

Approved: May 31, 1989

SINGLE BUSINESS TAX –
JURISDICTIONAL STANDARD

(Replaces Single Business Tax Bulletin 1980-1)

RAB-89-46. This Bulletin describes the jurisdictional standard to be used in determining whether or not a taxpayer is taxable in another state for purposes of apportionment under Single Business Tax. A taxpayer not subject to tax in another state must allocate the entire tax base to Michigan. [MCL 208.406]

A taxpayer whose business activities are taxable both within and without this State shall apportion his tax base as provided in Chapter 3 (MCL 208.40 through MCL 208.69) of the Single Business Tax Act. [MCL 208.416]

In order to determine nexus in other states, the Single Business Tax Act relies upon MCL 208.42 which states:

> "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more

> of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an effect on the jurisdiction position:

> *Amway* v *Department of Treasury*, ___ Mich App ___ (1989).
>
> *Complete Auto Transit, Inc.* v *Brady*, 430 U.S. 274 (1977).
>
> *Washington Revenue Department* v *Stevedoring Association*, 435 US 734 (1978).

In *Amway* the court indicated:

> "Although Amway did pay a nominal fee when it filed its annual reports in Kentucky . . . Amway did not have employees in Kentucky or own or rent property in that state. Although Amway apparently did solicit orders and make sales in Kentucky through independent contractors, and is registered to do business in Kentucky, these do not constitute a sufficient nexus to allow Kentucky to tax Amway [15 USC 381(a), (c)]. . . . Thus, Amway's Kentucky sales are considered Michigan Sales. . . . "

In *Complete Auto* and *Stevedoring Association* the United States Supreme Court ruled a state tax on the "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

1. There is substantial nexus with the taxing state, and
2. The activity within and without the state is fairly apportioned, and
3. The tax does not discriminate against interstate activity, and

4. It is fairly related to the services provided by the state.

Nexus

A taxpayer incorporated in the State of Michigan has nexus in Michigan and is therefore subject to Single Business Tax.

In determining whether a taxpayer has sufficient nexus with Michigan, the Department will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property. The definition of tangible personal property for this purpose will be determined under each state's respective laws.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. However, when the employee's activity goes beyond the solicitation of sales by providing services for the customer (including but not limited to technical assistance, inventory, or stock rotation) or services for the employer (including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim), there is sufficient nexus with Michigan to subject an out-of-state employer to single business tax. (See exception below for that activity conducted by independent contractors.)

Immunity

Only the sale of tangible personal property is afforded immunity under Public Law 86-272. Therefore, the leasing, renting, licensing or other disposition of tangible personal property is not afforded any such immunity from taxation. In addition, the selling or providing of services, and the selling, leasing, renting, licensing or other disposition of real estate or intangible property are not governed by the nexus standards of Public Law 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

Non-immune Activities. The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.

12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:
    A. Repair shop
    B. Parts department
    C. Purchasing office
    D. Employment office
    E. Warehouse
    F. Meeting place for directors, officers, or employees
    G. Stock of goods
    H. Telephone answering service
    I. Mobile stores (i.e., trucks with driver salespersons)
    J. Real property or fixtures of any kind.
17. Consigning tangible personal property to any person, including an independent contractor.
18. Maintaining, by either an in-state or an out-of-state resident employee, an office or place of business (in-home or otherwise).

19. Conducting any activity in addition to those described under Immune Activities below is not an integral part of the solicitation of orders.

Immune Activities. The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying product samples for display only or for distribution without charge or other consideration.
3. Owning or furnishing autos to salespersons.
4. Passing customer inquiries and complaints on to the home office.
5. Incidental and minor advertising (i.e., notice in newspaper that a salesperson will be in town at a certain time).
6. Missionary sales activities.
7. Checking of customers' inventories for reorder, but not for other purposes.
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting sales by an in-state resident employee of the taxpayer, provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

Public Law 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that

would not be afforded if performed by the taxpayer directly. Independent contractors may engage in the following limited activities in the State without subjecting the outstate taxpayer to single business tax:

1. Soliciting sales
2. Making sales
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the State by the independent contractor, under consignment or any other type of arrangement with the principal, shall remove the tax immunity.

Apportionment

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan whether or not a return is filed in the foreign state. When a taxpayer has minimal contact with a state and the taxpayer is apportioning to that state, and by such apportioning the tax base the taxpayer is avoiding taxation in another state, the Department will so advise the foreign state under the provisions of MCL 208.103:

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act

> to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to file an "Affidavit of Taxability" providing specific information and describing the activity subjecting the taxpayer to the foreign state's tax jurisdiction.

1989 REVENUE ADMINISTRATIVE BULLETINS

RAB Number

1989-34. Issuance of Bulletins and Letter Rulings.

1989-38. Officer Liability.

1989-39. Interpretation of Terms, Disclosure of Tax Return Information.

1989-50. Inchoate Tax Liens.

RAB 89-34. Issuance of Bulletins and Letter Rulings

RAB 89-34 replaces RAB 78-2.

The Michigan Revenue Act empowers the Department of Treasury to periodically issue bulletins that index and explain state tax laws. (See MCL 204.3(f).)

The purpose of this Bulletin is to establish the general procedures for issuing Bulletins and Letter Rulings as position statements of the Bureau of Revenue. These documents are to provide guidance to persons regarding the proper interpretation and application of Michigan tax laws administered by the Bureau of Revenue.

Revenue Administrative Bulletins

A Revenue Administrative Bulletin is a directive issued by the Commissioner of Revenue. Its purpose is to promote uniform application of tax laws throughout the State by the Bureau of Revenue personnel and provide information and guidance to taxpayers. A Revenue Administrative Bulletin states the official position of the Department, has the status of precedent in the disposition of cases unless and until revoked or modified, and may

be relied on by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth in the Bulletin. A taxpayer must consider the effects of subsequent legislation, regulations, court decisions, and Bulletins when relying on a Revenue Administrative Bulletin.

Information to prepare a Bulletin may be derived from the following sources, a list that is not all inclusive: law changes, judicial decisions, letter rulings, Attorney General Opinions, interpretation of rules, acquiescence and nonacquiescence in decisions of the Michigan Tax Tribunal, and announcements of tax and interest rates as required by law. All Revenue Administrative Bulletins are published in the Department's *Quarterly Tax Advisor* and are also available upon request.

Letter Rulings

A Letter Ruling is a formal document setting forth the position of the Commissioner of Revenue on specific tax matters. It is issued to taxpayers by the Commissioner of Revenue, or designee of the Commissioner, in response to a particular tax issue. Letter Rulings help to promote uniform application of tax laws throughout the State by Bureau of Revenue personnel and to provide guidance to taxpayers. A letter Ruling is prospective in nature. It provides a taxpayer with assurance regarding the tax ramification of a future transaction. The Department is bound by a Letter Ruling only for the specific transaction and only for the tax period indicated. Letter Rulings are available to the public upon request.

Technical Advice Letters

A Technical Advice Letter is an informal document released by a Tax Division of the Bureau of Revenue. It is issued by designated personnel in response to an inquiry by a taxpayer for technical assistance. Technical Advice Letters are based upon statutes, administrative rules, regulations, and court decisions having precedential value. These documents are not published and may be relied upon only by the taxpayers requesting their issuance.

Obtaining a Letter Ruling or Technical Advice Letter

A taxpayer or the representative of the taxpayer shall submit a statement to the appropriate Tax Division containing a complete account of the facts relating to a particular tax issue. The taxpayer must document in writing that the issue in question is not being litigated or challenged in an informal hearing of the Department or any other tribunal or court in this State. From this statement, the Tax Division will determine whether a Letter Ruling is needed to clarify the issue. The Division will draft a proposed Ruling then submit it to the Hearings and Tax Research Division for further processing. The Hearings and Tax Research Division determines when a Letter Ruling will be issued.

A Letter Ruling will contain sufficient information to enable a Tax Division or the taxpayer requesting such advice to rely on the Ruling. The Ruling will identify the taxpayer by name, address, identification number and tax year or years involved. The Letter Ruling will contain the pertinent facts, the issue, controlling law, application of law to facts, and a conclusion advising the taxpayer.

A Letter Ruling issued by the Commissioner of Revenue, or the designee of the Commissioner, will be forwarded to the taxpayer and the Tax Division affected by the Ruling. A Letter Ruling may be published after deletion of any matter identifying the taxpayer.

Obsolescence of Letter Rulings and Revenue Administrative Bulletins

A letter Ruling or Revenue Administrative Bulletin may become or be declared obsolete or revoked under the following conditions:

1. The statutory provision supporting the Letter Ruling or Revenue Administrative Bulletin is amended or repealed or authoritively construed by an appellate court decision having precedential effect.

2. The substance of the Letter Ruling or Revenue Administrative Bulletin is incorporated into a statute or in the Department of Treasury Administrative Rules.

3. A court decision having precedential value renders the ruling invalid.

When a Letter Ruling or Revenue Administrative Bulletin becomes obsolete, the Department may announce its obsolescence in a Revenue Administrative Bulletin. Subject to statutory authority, the Commissioner of Revenue is empowered to determine the retrospective application of rules and the effective date for applying changes, modifications or nullification of Letter Rulings.

Acquiescence/Nonacquiescence by the Commissioner

The Commissioner of Revenue may announce acquiescence or nonacquiescence in decisions of the Michigan Tax Tribunal and the Court of Claims. Bureau of Revenue personnel shall rely upon any decision that the Commissioner has acquiesced as having precedential value in the disposition of other tax cases.

If the Commissioner acquiesces in an adverse Tax Tribunal or Court of Claims decision, any contrary Letter Ruling or Revenue Administrative Bulletin shall be promptly modified or revoked.

Approved April 25, 1989

RAB 89-34

[LOGO]

STATE of MICHIGAN
JOHN ENGLER, Governor

DEPARTMENT OF TREASURY
TREASURY BUILDING, P.O. BOX 1528,
LANSING, MICHIGAN 48801
DOUGLAS B. ROBERTS, State Treasurer

REVENUE ADMINISTRATIVE BULLETIN 1998-1

Approved: February 24, 1998

SINGLE BUSINESS TAX NEXUS STANDARDS

(Replaces Revenue Administrative Bulletin 1989-46)

RAB 98 - 1. This Revenue Administrative Bulletin (RAB) describes the jurisdictional standard to determine whether a taxpayer is subject to tax under Michigan's Single Business Tax or is subject to tax in another state for purposes of apportionment under the Single Business Tax Act. This RAB supersedes RAB 1989-46. See page 3.

The limitations and extent of this State's jurisdiction to impose tax is an evolving area and this RAB is not intended to be an all encompassing or all inclusive description of this subject. This RAB may be modified by changes in either federal or state laws or by decisions of the U.S. Supreme Court, the Michigan Supreme Court, or the Michigan Court of Appeals. It may also be modified and reissued to incorporate nexus guidelines that may be published from time-to-time by agencies such as the Multistate Tax Commission or to clarify the Department's position. Where no conflict exists between this RAB and previously published positions taken by the Department,

those positions, as they relate to nexus, will remain in effect.

ISSUES

I. What is the jurisdictional standard to determine whether a taxpayer is subject to Michigan's single business tax jurisdiction?

II. What is the jurisdictional standard to determine whether a taxpayer is taxable in another state for purposes of apportionment under the single business tax?

III. When is this RAB effective?

IV. What time periods are covered once nexus is established?

V. When will a taxpayer subject to Michigan's taxing jurisdiction be required to file a single business tax return?

CONCLUSIONS

I. An out-of-state business is subject to Michigan's single business tax jurisdiction when it engages in any of the following activities:

    1) It has one or more Michigan resident employees conducting business activity in Michigan.

    2) It owns, rents, leases, maintains, or has the right to use and uses tangible personal or real properly that is permanently or temporarily physically located in Michigan.

3) Its employees own, rent, lease, use, or maintain an office or other establishment in Michigan.

4) Its agents, representatives, independent contractors, brokers or others, acting on its behalf, own, rent, lease, use or maintain an office or other establishment in Michigan, and this property is used in the representation of the out-of-state business in Michigan and is significantly associated with its ability to establish and maintain a market in Michigan.

5) It has goods delivered to Michigan in vehicles it owns, rents, leases, uses, or maintains or delivered by a related party acting as a representative of the out-of-state business.

6) It regularly and systematically conducts in-state business activity through its employees, agents, representatives, independent contractors, brokers or others acting on its behalf, whether or not these individuals or organization reside in Michigan.

   (a) Regular and systematic business activity exists if at least 10 days of business activity occurs in Michigan on an annual ("annual" meaning a 12 month taxable year) basis;

   (b) Regular and systematic business activity may exist depending on the facts and circumstances of the taxpayer if less than 10 days of business activity occurs in Michigan on an annual ("annual" meaning a 12 month taxable year) basis.

      (i) When examining the facts and circumstances of in-state business

activity, conducting any of the following activities in the State of Michigan for 2 or more days on an annual basis will be rebuttably presumed to constitute regular and systematic business activity:

(1) Soliciting sales;

(2) Making repairs or providing maintenance or service to property sold or to be sold;

(3) Collecting current or delinquent accounts related to sales of tangible personal property through assignment or otherwise;

(4) Installing or supervising installation at or after shipment or delivery;

(5) Conducting training for employees, agents, representatives, independent contractors, brokers or others acting on its behalf, or for customers or potential customers;

(6) Providing customers any kind of technical assistance or service including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services;

(7) Investigating, handling, or otherwise assisting in resolving customer complaints;

(8) Providing consulting services; or

(9) Soliciting, negotiating, or entering into franchising, licensing, or similar agreements.

(ii) Conducting any of the activities listed in 6)(b)(i) in the State of Michigan for 10 days or more will constitute regular and systematic business activity.

(c) Lawyers, accountants, investment bankers, and other similar professionals in Michigan who perform services for an out-of-state business in their professional capacity shall not be considered to be conducting in-state business activity on behalf of the out-of-state business.

7) If none of the business' activities in Michigan fall under paragraph 6)(b)(i) and its only contacts with Michigan are limited to conducting any of the activities listed below for less than ten days, such contacts will be presumed not to create nexus. If an activity is listed in (a) through (e) below but also is described under paragraph 6)(b)(i), then paragraph 6)(b)(i) shall control. If a business' only in-state activity is listed in 7)(f) such activity shall not be considered as solicitation for the purposes of paragraph 6)(b)(i). Conducting any of the activities listed below for more than ten days will not necessarily

create nexus. Whether nexus has been created will depend on the facts and circumstances of the in-state business activity.

(a) Meeting with in-state suppliers of goods or services;

(b) In-state meeting with government representatives in their official capacity;

(c) Attending occasional meetings (e.g., Board meetings, retreats, seminars and conferences sponsored by others, etc.);

(d) Holding recruiting or hiring events;

(d) Advertising in the state through various media;

(e) Renting to or from an in-state entity customer lists; or

(f) Attending and/or participating at a trade show at which no orders for goods are taken and no sales are made.

II. The same standards used to determine nexus for out-of-state taxpayers, as described in paragraph I above, will be applied to determine whether a taxpayer is taxable in another state for purposes of apportionment under the single business tax. For purposes of Michigan's throwback rule, "nexus" in other states must be documented and will be subject to verification by the Department of Treasury.

III. This RAB applies to all open tax periods ending on or after January 1, 1989 in accordance with the *Guardian Industries Corp v Dep't of Treasury*, 198 Mich App 363; 499 NW2d 349, *lv app din* 444 Mich 943; 512

NW2d 846 (1994), and *Gillette Co v Dept of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), *lv app den* 445 Mich 861; 519 NW2d 156 (1994), decisions of the Michigan Court of Appeals. In these cases the Court held that Public Law 86-272, 15 USC §318(a) (1959)(P L 86-272), was not the appropriate nexus standard for the Michigan single business tax.

IV. Once nexus is established by a taxpayer during a tax year for single business tax purposes, nexus shall exist for that taxpayer for at least that entire tax year.

V. Taxpayers that fall within the State's taxing jurisdiction will be required to file single business tax returns if they conduct business activity within the State and have apportioned or allocated gross receipts plus adjustments provided in MCL 208.23b (a), (b), and (c); MSA 7.558 (23b) in excess of the amounts provided under MCL 208.73); MSA 7.559 (73). Currently MCL 208.73 provides that no return filing obligation accrues if adjusted apportioned or allocated gross receipts do not exceed:

> For tax years beginning before January 1, 1991 – $40,000;
>
> For tax years beginning after December 31, 1990 and before January 1, 1992 – $60,000;
>
> For tax years beginning after December 31, 1991 and before January 1: 1994 – $100,000;
>
> For tax years beginning after December 31, 1993 and before January 1, 1995 – $137,500;
>
> For tax years beginning after December 31, 1994 – $250,000.

LAW AND ANALYSIS

Introduction

The Single Business Tax (SBT) is imposed on the adjusted tax base of "every person with business activity in this state". MCL 208.31(1); MSA 7.558(31)(1). A business is subject to the single business tax if it has nexus with the State of Michigan under the Due Process and Commerce Clauses of the U.S. Constitution and is conducting business activity in Michigan as defined under MCL 208.3(2); MSA 7.558(3)(2).

If the taxpayer is not subject to tax in another state, the taxpayer is not subject to apportionment and must allocate the entire tax base to Michigan. MCL 208.40; MSA 7.558(40). Sales made into other states where the taxpayer is not taxable are considered Michigan sales and are "thrown back" into the taxpayer's SBT tax base.

A taxpayer is "taxable in another state" if "(a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has the jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not." MCL 208.42; MSA 7.558(42). In short, a taxpayer will be subject to a tax in another state if the taxpayer has due process and commerce clause nexus with that state. If a taxpayer is taxable in another state, sales made into that state from Michigan are excluded from the numerator of the sales factor used in the SBT's apportionment formula.

This bulletin is intended as a guide. Because commerce clause nexus is an ever-evolving area of law and is likely to chance, readers are encouraged to review recent court decisions from Michigan and Federal appellate courts.

Rescission of RAB 1989-46

Following the publication of RAB 1989-46, the Michigan Court of Appeals determined that Public Law 86-272 did not apply to taxes imposed under the SBT and invalidated RAB 1989-46. *Gillette Co, supra; Guardian Industries Corp, supra.* Pursuant to these decisions, the requirements of P L 86-272 do not control whether a taxpayer is taxable in Michigan or whether a taxpayer is taxable in another state for the purposes of the single business tax apportionment. Any activity that would otherwise be considered protected under P L 86-272 will not be protected for the purposes of determining nexus or "throwback sales" under the SBT.

Jurisdictional Standard

The Due process and Commerce Clauses of the U.S. Constitution define U.S. constitutional limitations on state jurisdiction to tax. The nexus requirements of both Clauses must be satisfied before an out-of-state business may be subject to the taxing jurisdiction of a State. Due Process nexus is satisfied for application of the single business tax when a person has economic or physical presence in Michigan. Economic presence is satisfied when a business purposefully, on its own or through a representative, avails itself of the benefits of an economic market in Michigan. *Quill Corp v North Dakota,* 504 US

298; 119 LEd 2d 91; 112 SCt 1904 (1992); *Burger King Corp v Rudzewicz*, 471 US 462; 105 SCt 2210; 85 LEd 577 (1985); *International Shoe v Washington*, 326 US 310; 66 SCt 154; 90 LEd 95 (1945). For example, the U.S. Supreme Court has held that engaging in continuous and widespread solicitation of business within a state constitutes economic presence. *Quill*, 504 US at 308.

The United States Supreme Court held in *Complete Auto Transit Inc v Brady*, 430 US 274; 97 SCt 1076; 51 LEd 2d 326 (1977), that a state tax satisfies the requirements of the Commerce Clause if it meets four requirements:

1. The tax is applied to an activity with substantial nexus with the taxing state.

2. The activity – both in and out of the state – is fairly apportioned.

3. The tax does not discriminate against interstate commerce.

4. The tax is fairly related to services provided by the state.

The U.S. Supreme Court has most recently addressed the Commerce Clause substantial nexus requirement for use tax collection in *Quill, supra*, In *Quill*, the Supreme Court stated that substantial nexus for use tax collection is a bright line physical presence test. The Court reaffirmed its twenty-five year old holding in *National Bellas Hess*, 386 US 753; 87 SCt 1389; 18 LEd 2d 505 (1967), that those persons whose contacts with a State do not exceed U.S. mail or common carrier do not have substantial nexus and cannot be required to collect use taxes. The Court noted that substantial nexus for use tax collection is satisfied by the presence of a "small sales force, plant, or

office" in the taxing state. In a footnote, the Court commented that it had previously rejected a "slightest presence standard of constitutional nexus" in *National Geographic Society v California Bd of Equalization,* 430 US 551, 556; 97 SCt 1386; 51 LEd 2d 631 (1977).

The *Quill* Court also stated that it has not imposed a physical presence requirement for any taxes other than sales and use taxes. The Court reaffirmed the "bright line" physical presence test of *National Bellas Hess* based on the reliance interest of taxpayers and because it was a long standing rule. The Court noted, however, that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." *Quill,* 504 US 311, 314. This leaves open the question of whether a physical presence standard applies to taxes other than sales and use taxes or whether, in fact, a lesser nexus standard applies. Nonetheless, there is no question that when a person has physical presence in this State, substantial nexus under the Commerce Clause exists for imposition of the SBT.

The Michigan Court of Appeals in *Magnetek Controls, Inc v Dep't of Treasury,* 221 Mich App 400; 562 NW2d 219 (1997), applied the *Quill* decision and held that the requirement of "substantial nexus" does not mean that physical presence in the taxing state must be substantial but only that it be more than the slightest physical presence. Quoting from *Orvis v Tax Appeals Tribunal of the State of New York* 86 NY2d 165; 654 NE2d 954, 960-961 (1995), the Michigan Court of Appeals stated the test as follows:

> While a physical presence . . . is required, it need not be substantial. Rather, it must be

> demonstrably more than a 'slightest presence'. . . . And it may be manifested by the presence in the taxing State of . . . property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf

Magnetek at 411, citations omitted.

Though the Taxpayer in *Magnetek* had no offices or plants in the other states, the Court of Appeals found that the taxpayer's 10 business days or "two weeks of solid effort" annually in each of the destination states was sufficient. The Court rejected the argument that an in-state sales force continuously soliciting sales had to be present in each of the other states before the taxpayer could meet the "substantial nexus" requirement in those states. It regarded as relevant both the visits and activity of sales managers as well as sales visits by independent sales representatives.

The United States Supreme Court in *Tyler Pipe Industries, Inc v Washington Dep't of Revenue*, 483 US 232; 107 SCt 2810; 97 LEd 2d 199 (1987), held the activities of local sales representatives of an out-of-state corporation provided a sufficient nexus with the State of Washington to justify the collection of the wholesale tax on the corporation's local sales. For this purpose, it made no difference that the local representatives were independent contractors, rather than employees of the corporation.

In *Scripto, Inc v Carson*, 362 US 207; 80 SCt 619; 4 LEd 2d 660 (1960), the U. S. Supreme Court held that Florida may require a nonresident seller who has no regular employees or agents in the state and does not own, lease or maintain any office, distributing house, warehouse or

other place of business there to register as a dealer and collect its use tax. The regular solicitation of sales by part-time independent brokers satisfies the requirement of nexus, that there be a definite link or a minimum connection between a state and the person, property or transaction it seeks to tax. Calling a "salesman" an "independent contractor" does not change his local function and has no bearing upon the effectiveness of his local solicitation, which results in a substantial flow of goods into the state.

In sum, the U.S. Supreme Court has held that substantial nexus exists when in-state activities are performed on behalf of an out-of-state company regardless of whether these activities are performed by employees, agents, representatives, independent contractors, brokers or others.

This RAB reflects the U.S. Supreme Court and the Michigan Court of Appeals decisions discussed above.

Definitions

The following definitions are used in this bulletin:

(a) "Business Activity" as defined in MCL 208.3 (2); MSA 7.558(3) means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services

as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

(b) "Related Party" means any individual or entity that qualifies or would qualify as (i) an affiliated group or a controlled group of corporations under section 1563 of the internal revenue code or (ii) an entity under common control under internal revenue code regulation 1.414(c)-2 provided that "50 percent" shall be substituted for "80 percent" in determining when an individual or entity is part of an affiliated group, a controlled group of corporations, or an entity under common control.

(c) "Representative" means any individual or entity that conducts business activities in the taxing State on behalf of another. The term does not include employees. The term includes, without any limitation on the foregoing, agents, corporate or other business entities, related or unrelated to the other business, and independent contractors. The term also includes sub-representatives. A representative may be a resident or non-resident of the taxing State.

(d) "Sale" or "sales" means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (i) for the transfer of title to, or possession of property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or properly held by the taxpayer primarily for the sale to customers in the ordinary

course of its trade or business, or (ii) for the performance of services, which constitute business activities other than those included in (i), or from any combination of (i) or (ii).

(e) "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

THE TOPPS COMPANY, INC.,

Plaintiff,

vs. File No. 96-16324-CM

MICHIGAN DEPARTMENT OF TREASURY,

Defendant.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE THOMAS L. BROWN,
CIRCUIT JUDGE
LANSING, MICHIGAN – WEDNESDAY, APRIL, 9, 1997

APPEARANCES:

PATRICK R. VAN TIFLIN P26119
The Phoenix Bldg., Ste. 500
222 North Washington Square
Lansing, MI 48933

On behalf of the Plaintiff

TERRY P. GOMOLL P14148
First Floor, Treasury Bldg.
Lansing, Mi 48922

On behalf of the Defendant

Reported by: Teresa J. Abraham, CSR-3445
[2] Lansing, Michigan
April 9, 1997.

THE COURT: Topps. Mr. Gomoll?

MR. GOMOLL: May it please the Court, I am Assistant Attorney General Terry Gomoll representing the State of Michigan, Department of Treasury.

THE COURT: You can move that roster around if you want, Mr. Gomoll. It's on wheels. All right?

MR. GOMOLL: This is the time scheduled for the Defendant's motion for summary disposition. Defendant has filed a two-part motion for summary disposition. The first part is a motion for summary disposition under MCR 2.116(C) (8) for failure to state a claim upon which relief can be granted. The second part of the motion for summary disposition is under (C) (10) which asserts that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law.

In regards to the (C) (8) motion, Plaintiff's complaint requests that the Court apply the nexus standard set forth in the Department's bulletins, that nexus standard, Public Law 86-2672. The Court cannot grant that relief because the Court of Appeals [3] determined in the *Gillette* case four years ago that Public Law 86-272 is inapplicable to the Single Business Tax.

THE COURT: Excuse me. The standards that the Defendant set forth are contrary to the law?

MR. GOMOLL: Well, the –

THE COURT: They were at the time you issued them for or what?

MR. GOMOLL: The bulletins were issued before the Court of Appeals' decision in *Gillette*.

THE COURT: Okay.

MR. GOMOLL: So the *Gillette* decision overruled those bulletins. In 198 Mich App at page 311 Judge Riley specifically stated accordingly, We conclude that the restriction imposed by Public Law 86-272 does not apply to taxes imposed under the Single Business Tax Act. Instead the Court of Appeals applied the Due Process Commerce Clause nexus standard.

There are at least three reasons why the Court cannot grant the relief requested by Plaintiff. First of all, pursuant to the principle of *stare decisis* and Court Rule MCR 7.215(C) (2) the Court of Claims is bound by the Court of Appeals' decision in *Gillette*.

Secondly, the general rule –

THE COURT: I do understand that the [4] Plaintiffs prepared a tax return in accordance with the instructions of the Defendant. But in the meantime the rules changed or something like that?

MR. GOMOLL: Well, under the facts, the bulletin, first bulletin was issued in 1980. I think the second bulletin was issued in 1989 using Public Law 86-272. And the Topps Company did in fact file tax returns for 1989, 1990, 1991.

THE COURT: Is there any question they filed these returns in accordance with these instructions?

MR. GOMOLL: I think Plaintiff claims that they didn't.

THE COURT: Didn't? Okay.

MR. GOMOLL: Okay. But they still filed them under the bulletins. So first of all, the Court is bound by the principle of *stare decisis* and the Court Rule.

Secondly, the general rule that decisions of Court of Appeals in Supreme Court are applied retroactively.

Thirdly, most importantly, every court which had considered the nexus issue has applied the Due Process Commerce Clause nexus standard. In the *Gillette* case, the Court of Appeals explicitly recognized that [5] the Department had been using Public Law 86-272 as a guide for determining nexus. In spite of that, the Court of Appeals determined that Public Law 86-272 was inapplicable to the Single Business Tax.

Now, after the Court of Appeals' decision, the *Gillette* company filed a motion for rehearing claiming that the Court of Appeals' opinion denied *Gillette's* equal protection rights in the motion for rehearing. *Gillette* asked for the same thing that Plaintiff is asking for here. *Gillette* requested that the Court of Appeals rehear and reconsider its opinion and recognize the Department's longstanding uniformly applied application of Public Law 86-272 as the SBT jurisdictional test.

So in *the Gillette* case, *Gillette* asked the same thing Plaintiff requests here. The Court of Appeals denied *Gillette's* motion for rehearing. The Michigan Supreme Court in the U.S. Supreme Court subsequently denied *Gillette's* application for leave to appeal.

In the *Michigan Chrome & Chemical* case, which is attached to my brief, the Court of Appeals stated, Plaintiff correctly points out that the Defendant in the tribunal

made an error of law by improperly applying Public Law 86-272 as a governing [6] standard. The proper standard for determining whether a taxpayer's taxable in other states for purposes of apportionment under MCL 208.42 is whether the imposition of the Single Business Tax on the taxpayer is permissible under the Due Process and Interstate Commerce Law clauses.

In another case, the case of *Howmet Corporation*, which is also attached to the Defendant's brief, the Court of Appeals stated: This Court has recently discussed the appropriate framework for analyzing whether sales solicitation in other states is taxable in those states within the meaning of MCL 208.42. In two separate decisions, this Court held that given USC 381, parenthesis, Public Law 86-272, closed parenthesis, does not apply to taxes imposed under the SBTA.

And another case in the Court of claims in regarding *Cosmare(sp) versus Department of Treasury*, Judge Harrison applied the Due Process Commerce Clause nexus test in spite of *Cosmare's* claim that retroactive application of Gillette violated *Cosmare's*, rights to equal protection.

Another case in the tax tribunal, *Syntex Laboratories versus Department of Treasury*, the Michigan Tax Tribunal also applied the Due Process Commerce [7] Clause nexus test in spite of *Syntex* claiming retroaction application of *Gillette* violated equal protection. I do have copies of those opinions if the Court would like to review those.

In summary, the Court of Appeals, Court of Claims and Tax Tribunal have determined that *Gillette* should be applied retroactively.

In regards to the (C) (10) motion –

THE COURT: The question of retroactivity has not been divided, though, right, other than in *Gillette*?

MR. GOMOLL: It's implicit that they are all applying in the *Cosmare* and *Syntex* claims.

THE COURT: Those cases weren't contested, right?

MR. GOMOLL: They were contested.

THE COURT: They are on appeal?

MR. GOMOLL: They are both pending on appeal.

THE COURT: We don't know yet whether the Court of Appeals, Supreme Court is going to agree that retroactive imposed in *Gillette* is going to be imposed in other matters?

MR. GOMOLL: The general rule it is, U.S. Supreme Court –

[8] THE COURT: Didn't *Gillette* kind of come out of the blue?

MR. GOMOLL: *Gillette* filed a motion for rehearing saying this violates our equal protection rights.

THE COURT: They have no place for that, right?

MR. GOMOLL: Yes, the Court of Appeals denied it, that's binding. Then the Michigan Supreme Court denied their application.

THE COURT: I guess the Court of Appeals can come out of the blue with another one. It's not cut and chiseled in stone yet.

MR. GOMOLL: Under the Michigan Supreme Court Rules, all other panels are bound by the *Gillette* decision.

THE COURT: I assume we will have, Mr. Van Tiflin will have some different shading on that.

MR. GOMOLL: I am sure he will.

Your Honor, in regards to the (C) (10) motion, as indicated in Defendant's brief, presence of a small sales staff, such to establish nexus under the Due Process Commerce Clause nexus standard as indicated in the complaint, in the Defendant's exhibit in this matter. There is no question that Plaintiff maintained [9] a small sales staff in Michigan. Plaintiff had two resident employees who solicited orders from customers in Michigan. Also had two other employees who conducted activities in Michigan during the years in question.

For the reasons set forth above, Defendant's motion for summary disposition should be granted and Plaintiff's should be dismissed. If the Court has any questions I would be more than willing to address those.

THE COURT: Thank you. Mr. Van Tiflin?

MR. VAN TIFLIN: Thank you, Your Honor.

May it please the Court, Patrick Van Tiflin on behalf of the Plaintiff Topps Company. With me at counsel table is the, as the Court will note on the brief, is my partner, Donna Clarke, who is working with me on this file.

Your Honor, I am surprised to hear Mr. Gomoll say that the Court can't grant the relief which Plaintiff is seeking in this case. I'm not surprised that he disagrees with me, but I am surprised that he says that this Court certainly can't grant the relief involved.

Exhibit One to our brief, Your Honor, is the jurisdictional standard that was issued by the Department of Treasury back in 1980, issued May 1st of [10] 1980, a jurisdictional standard for application of the Single Business Tax. And on page two of that bulletin, it says that in arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272.

Again, in 1989, a little bit more than nine years to the day after this jurisdictional bulletin was issued, there was another one issued, bulletin 89-46, which says exactly the same thing on page two in determining whether a taxpayer has sufficient nexus with Michigan, the Department will use the court cases developed under public law 86-272. The interesting thing about that second bulletin, Your Honor, is that they actually use the words "tax immunity" in that bulletin. In the 1989 bulletin it says immunity from tax under Public Law 86-272.

The reason that those bulletins are important, Your Honor, because at about the same time this 1989 bulletin was issued on the jurisdictional standard for the SBT, Treasury had just issued another bulletin. This one bulletin, 89-34, this is attached to our brief as Exhibit eight, and it talks about the process for issuing bulletins and what the impacts of those bulletins and letter rulings are. In relative part, quoting here, a revenue bulletin states the [11] official position of the Department, number one,

it's the official decision of the Department. Number two, it has the status of precedence. Number three, and most significantly, may be relied on by taxpayers.

So at the same time that they virtually, the same time they issued this bulletin saying we are going to promulgate bulletins, it states our official position the taxpayers may rely on it, they issue the 1989 bulletin on the Single Business Tax, they say Public Law 86-272.

So it seems to me that it was imminently reasonable for Topps and a whole host of other companies who are not based in Michigan to read the Department's bulletin and say, all right, here are the rules on which we can engage in transaction within Michigan as long as we stay within this immunity as Defendant prescribed by this Federal statute. We are not going to have to file a Single Business Tax return. We are not going to have to pay. We know these are the rules we have to comply with in order to come within that safe harbor.

With regard to the *Gillette* decision, this Court has observed the fact that Court of Appeals may have issued a decision in *Gillette*. I certainly disagree with Mr. Gomoll in terms of whether or not retroactivity it was decided by the *Gillette* decision. [12] As the Court knows from reviewing the briefs, the taxpayer, and for the Department in *Gillette*, both argue that this Federal law 86-272 was the appropriate standard.

And to paraphrase the Court's words, this decision on a new nexus standard came right out of the blue. Neither party was arguing for that result in that case. As the Court also knows, a denial by a Court of Appeals'

panel of a motion for rehearing does not have any precedential effect whatsoever. That was the first time in the motion for rehearing. That was the first time that the question of retroactivity crept into that *Gillette* case. As a matter of fact, there is a case pending in the Court of Claims right now, Your Honor, involving *Gillette*, involving the question of whether that Court of Appeals' decision can be applied retroactively to them. It's pending right now in front of Judge Houk.

I think it's also correct, if I followed your line of questioning in your comments to Mr. Gomoll on his direct argument, it's also correct that none of these other cases that he cites in his brief or cited this morning have dealt with and have ruled upon the question of the retroactivity application of the *Gillette* rule. They may have applied it, but neither [13] party was contending on that issue. Therefore, I don't believe those cases have precedential value either. Furthermore, those cases that he referred to are not nexus cases like *Gillette* was and like Topps was.

Now, he did cite one case this morning that is not in his brief. It's not attached to his brief. The *Cosmare(sp)* case, the Judge Harrison case. So I guess I am not going to be able to respond to that because I haven't been treated with that in terms of being cited in his brief. We haven't had a chance to respond to it with regard to these cases he has cited, both nexus cases weren't decided on the basis of retroactivity.

Both parties, in their briefs, have discussed in the U.S. Supreme Court decision entitled *Harper*. In the *Harper* case, the U.S. Supreme Court said, when a Federal state court makes a decision on a Federal issue, if applied

retroactively to the parties in that case, then it has to be applied retroactively to all parties who are under review.

That case does not apply in this situation, Your Honor, because in *Gillette*, this Michigan Court of Appeals panel was deciding an issue of state law. The question was, what jurisdictional standards apply to this Michigan Single Business Tax. [14] And in order to decide that question, they needed to look to the Michigan statute to decide what kind of a case it was. If it was a tax on income, then one set of rules would apply. If it was a privileged tax, then a different set of rules would apply. But they were interpreting a Michigan State law question. So *Harper* does not apply.

In fact, there are at least three Michigan cases that do apply in that instance where there is a new rule of law that has been announced that was not clearly foreshadowed where there was established precedent that is overruled. And in those cases, the *Buckeye* case with the Court of Appeals, the *Penn Mutual* case with the Michigan Court of Appeals, and the Michigan *D'Amico* case of the Supreme Court, all three of those Michigan cases interpreting Michigan law have applied the new rule prospectively. They say, look, it's unfair in these instances, apply these rules retroactively. No one new rule comes down, no one contending for new rule. Those three tests are, first of all, overruling an established precedent. We know from that revenue administrative bulletin that these bulletins have the force and effect of precedence.

Secondly, in deciding the issue of first impression, that certainly is the case. We allege that [15] in their

complaint that the *Gillette* case decided to rule first impression. Defendant admitted that in their answer. Third resolution was not clearly foreshadowed in the *Gillette* case, that certainly was true. Neither party contends for that result in *Gillette*.

It's also important, I think, to observe the other U.S. Supreme Court decision we cited in our brief, which is the *Welch*. Case that one discussed when you legitimately and consistently by due process have retroactive application or imposition in taxes, there are three tests there:

First, could the taxpayer have altered his or her behavior. The answer there is a strong emphatic, Yes, you bet they could have if they had been told by Treasury. The rules are different than what Treasury put in their bulletin, they could have their altered behavior and would have altered it.

Second, did the taxpayer have notice of tax when he or she engaged in transaction? No. The rules set forth in the bulletin, as long as you comply with this behavior, you wouldn't be subject to that tax.

Third, is the tax a new tax? You bet. If you are told you are not taxable, if you do A, B and C, later on you are told retroactive you are taxable [16] because you did A, B and C, that's a new tax in effect and in law.

Now, there has been reference by both parties in their brief to the *MagNetek* decision in particular. I am familiar with that case because we are involved in the *MagNetek* case as well. First thing I would like to say about that, I think it's a little bit ingenuous for the Defendant to rely on the decision of Court of Appeals. *MagNetek*, at the

present time, they have a motion pending rehearing, pending the challenging decision in *MagNetek*.

Be that as it may, I think the important thing about *MagNetek* in question of retroactivity. There's a critical difference between *Topps* and *MagNetek*. *MagNetek* is a Michigan-based company. *MagNetek* did not rely upon revenue administrative bulletin that the Treasury issued on this jurisdictional question. So that's the critical difference. As we know from looking at the *Buckeye* case, as we know from looking at the *Penn Mutual* cases, that you have to have reliance. And there is no reliance in this case. In fact, Treasury, in their bulletin, their first 1989 bulletin, says that taxpayers may rely on these things. Topps did, *MagNetek* didn't.

In summary, Your Honor, I think that this [17] case presents really a classic case of why we have a court system. I think that the courts exist to prevent injustice, remedy injustice when it occurs. I don't think I have ever seen a more clear case of injustice and unfair application of tax law than what the Department is attempting in this case. The rules were set forth very, very clearly.

In a separate bulletin, Treasury said taxpayers could rely upon those rules. And then there is a substantive change in the law not clearly foreshadowed. It's a C-change in the law. That's an unjust result in anybody's book. I think that's the reason we have courts, to prevent injustice, remedy injustice.

Finally, Defendant answers to the facts were returns filed in some of those years by the Topps Company as indicated in the brief. Those returns were filed in error, they should not have been filed. That shouldn't change

the fact that one set of rules promulgated a different set of rules attempted to be applied retroactively. We think that's an unjust result.

For those reasons we think we have stated a claim upon which relief can be granted. We do not believe Defendant demonstrated this type of judgment as [18] a matter of law. We would respectfully request the Court deny the motion. Thank you, Your Honor.

THE COURT: Any response?

MR. GOMOLL: About four points I want to make in response, Your Honor.

First of all, in regards to the U.S. Supreme Court decision in *Harper*, Mr. Van Tiflin said that *Harper* doesn't apply because it's a state law. But the nexus standard, which the courts are applying, is federal law. It's either Federal Statute Public Law 86-272 or it's the Due Process Commerce Clause provisions under the U.S. Constitution. So the nexus, the state courts are applying Federal law to determine what nexus standards should be applied.

Secondly, in Harper, the U.S. Supreme Court said when this court applies a rule of Federal law to the parties before it, that rule is the controlling interpretation of Federal law, and must be given full retroactivity effect in all cases still open on direct to be reviewed, and as to all events. So applying that to the *Gillette* case, in *Gillette* the Court of Appeals applied the Federal nexus standards, Due Process Commerce Clause. They applied that to *Gillette*. And under *Harper* that decision has to be applied to everyone else, all cases still open and in all subsequent [19] events.

Secondly, Mr. Van Tiflin suggests that *Gillette* overruled established precedent. That is not true. Right in the *Gillette* decision itself the Court of Appeals referred to the previous *Amway* case in which the Michigan Supreme Court had vacated the Court of Appeals' decision in *Amway* and remanded it to determine whether public law 86-272 did apply to the Single Business Tax. So there wasn't a clear established precedent. And the Court of Appeals' decision in *Gillette* recognized that there was no clear and established precedence.

Thirdly, in a similar decision in the Court of Appeals recently in the *Gainey* case, which is mentioned in my brief, the taxpayer said the Department should be bound by a longstanding sales and use tax bulletin. The taxpayer claimed it was entitled to refunds based upon the longstanding sales and use tax bulletins. The Court of Appeals in *Gainey* said that was beyond – that was an error of law, that was beyond the Department's authority to issue that bulletin, it was contrary to law. So the Court of Appeals said the taxpayer was not entitled to refund. And, specifically, the Court said, Similarly, we reject Plaintiff's argument that because great deference must be accorded, [20] the Defendant's original interpretation of the general Sales Tax Act, the Defendant's interpretation of that act should be upheld. So they rejected that. And the Court of Appeals said intent of legislature and law should apply over the Department's bulletin. Same case in this matter, the law in *Gillette*, proper standards Due Process and Commerce Clause that prevails over the Department's bulletin.

Finally, I just want to mention that Plaintiff claims that they relied on the Department's bulletins. That's a

bunch of hogwash. The Plaintiff filed, voluntarily filed, voluntarily paid single business taxes for the years 1989, 1990 and 1991 under the Department bulletins. Now, they say, well, we made a mistake, well, they were following the bulletins when they filed the returns. That's a very insincere claim not supported by the facts of the case.

If the Court has any more questions, I would be more than glad to address those.

THE COURT: Okay. Thank you. The Court has the matter under advisement.

MR. VAN TIFLIN: Thank you, Your Honor.

MR. GOMOLL: Thank you, Your Honor.

THE COURT: I will revisit retroactivity.

[21] MR. GOMOLL: Your Honor, there is a pre-trial scheduled for April 23rd, trial for May 5th.

THE COURT: Hopefully I will be on vacation. It's probably a backup. I wouldn't worry about it. It's probably not going to go to trial. I have a whole bunch of jury trials, unless they all settled.

(Whereupon, proceedings concluded.)

[22] CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I, Teresa J. Abraham, Certified Shorthand Reporter for the Thirtieth Judicial Circuit Court, State of Michigan, do hereby certify that the foregoing pages, one through 22 inclusive, comprise a complete, true and correct transcript of the proceedings taken in this matter on Wednesday, the 9th day of April, 1997.

/s/ Teresa J. Abraham
Teresa J. Abraham, CSR-3445
Certified Shorthand Reporter

Dated: September 24, 1997

TAXPAYER NAME : THE TOPPS COMPANY, INC.
ACCOUNT NUMBER : 11-2849283
AUDIT PERIOD : 03/01/89 thru 02/28/93

SBT AUDIT TRANSMITTAL

DESCRIPTION OF BUSINESS

THE TOPPS COMPANY, INC., is a multi-national marketer of entertainment products, principally picture cards, confections and comic books, with manufacturing facilities in Pennsylvania, USA and the Republic of Ireland. The company, founded in 1938, created BAZOOKA brand bubble gum in 1947 and marketed its first TOPPS baseball card in 1951.

MICHIGAN BUSINESS ACTIVITY:

The taxpayer claims to have no nexus in Michigan for FY 02/92 and 02/93 and did not file a Michigan C-8000 for those years. The taxpayer has two full-time employees (Michigan residents) who call on customers to solicit orders for approval in New York. Orders are shipped from warehouses in Pennsylvania to Michigan and other states. The two Michigan salespersons use automobiles provided by the taxpayer and rented from Minnesota auto rental locations. The taxpayer further claims that no inventory (samples) are maintained in Michigan and no office space is rented.

The taxpayer has relied on its interpretation of PL 86-272 in its determination of nexus and its obligation to file

with Michigan. It is expected that the taxpayer will protest the audit deficiency for FY 02/92 and 2/93. Mr. Thomas Locicero, CPA., and TP representative argues that pursuant to Michigan RAB 89-46, THE TOPPS COMPANY is not required to file a Michigan 0-8000 for 2/90 thru 1/93. The taxpayer filed a claim for a refund of taxes paid for FY 2/90 and 2/91, dated 7/12/94. See letter attached.

PRIMARY CAUSE OF DEFICIENCY/CREDIT

The primary cause of the audit deficiency is enumerated hereunder:

FYE 02/90 –	Increase in the apportionment factor.
	Decrease in sales denominator causes increase in the sales factor.
FYE 02/91 –	Increase in the apportionment factor.
	Decrease in the sales denominator causes results in an increase in the sales factor.
FYE 02/92 –	Taxpayer did not file or pay any Single Business Taxes.
FYE 02/93 –	Taxpayer did not file or pay any Single Business Taxes.
Tax year:	March thru February
Type of Entity:	Corporation
Method of Accounting:	Accrual

TAXPAYER NAME: THE TOPPS COMPANY, INC.

ACCOUNT NUMBER: 11-2849283

AUDIT PERIOD: 03/01/89 thru 02/28/93

List of Records Used in Audit:

FEDERAL 1120

FEDERAL 940/941

MESC 1020

STATE ALLOCATION WORKPAPERS

MISCELLANEOUS

Name of Taxpayer Representative & Title: THOMAS LOCICERO, CPA

Federal & State Annual Tax Returns Prepared by: THOMAS LOCICERO, CPA

Business Code & Correctness: #207 checked.

Were audit results reviewed with taxpayer or representative? Yes

Was audit accepted? If not, what issue(s) are unresolved?

1 – Mr. Locicero, CPA maintains that he has relied on Michigan's RAB 89-46 and has not filed a return for FY 2/92 and 2/93. He claims that the company is not required to file a return for those years as it engaged solely in solicitation.

2 – Mr. Locicero claims that the company had nexus in FY's 2/90 and 2/91 when they allocated samples (kept by salesman) in Michigan.

Are agreed to portions separate from contested portions of the audit?

No, as TP virtually disagrees with entire assessment.

Great Lakes Questionnaire: (Indicate one of the following):

Not applicable or insignificant interstate commerce sales.

Applicable Questionnaire submitted with this audit.

Nexus Questionnaire: (Indicate one of the following):

Not applicable – Gross receipts everywhere less than $12M annually AND does not conduct sales activity in more than 4 states including Michigan.

Applicable – Gross receipts everywhere exceed $12M annually and does conduct sales activity in more than 4 states including Michigan. Nexus questionnaire submitted with this audit.

Discovery projects: Based on the department's resident employee position, the Discovery division has contacted taxpayers who have resident employees which had not filed SBT returns. These companies were asked to file returns beginning with 1989.

1652 taxpayers were contacted. So far the project has generated $18,142,759 in revenue.

(1099 Project) A match of taxpayers with 1099 income in excess of the SBT filing threshold has generated $12,400,000 from approximately 2700 taxpayers.

ERISA ISSUE: This issue relates to the inclusion of certain ERISA plans in the compensation component of the SBT base. We won the first case Thiokol v. Roberts. A similar case, Akzo America resulted in an opposite ruling. Both of these cases are on appeal to the 6th Circuit.

Although in Akzo the court ruled in the taxpayer's favor in regards to the ERISA preemption, the court did rule that because this was a constitutional issue, that any claim for refund must be filed within 90 days from the date set for filing of the original return.

Severance Tax: In the Michael T. Cowen v. MDT case, the court ruled that the severance tax act prohibits the imposition of the SBT on the owner of working interest in oil and gas wells in Michigan. This decision was affirmed by the court of appeals and the Michigan Supreme Court denied leave to appeal. We are now processing refund claims based on this decision.

The only area where there are problems is where a taxpayer has mixed activities which include both oil and gas production and some other activity. In these cases, a

breakdown must be made to separate exempt from taxable activities.

Software royalties: The department's position is that licensing for use does not generate royalty income. Under the Field Enterprises decision, payments received for rights protected under copyright are royalties. Licensing for use of a computer program is not a protected right based on Field Enterprises.

The department's position is that the purchase (license to Use) of computer software is no different than the purchase of a copyrighted book. You purchase the right to read and enjoy the book, but not the right to exploit it.

JUDGE THOMAS L. BROWN

STATE OF MICHIGAN
COURT OF CLAIMS

THE TOPPS COMPANY, INC.,

Plaintiff,

v

Case No.
96-16324-CM

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant.

PATRICK R. VAN TIFLIN (P26119)
MICHELE L. HALLORAN (P29973)
KIM D. CROOKS (P40485)
Howard & Howard Attorneys, P.C.
Attorneys for Plaintiff
The Phoenix Building, Suite 500
222 North Washington Square
Lansing, Michigan 48933
(517) 485-1483

COMPLAINT

NOW COMES the Plaintiff, The Topps Company, Inc., by and through its attorneys, Howard & Howard Attorneys, P.C., and for its Complaint against the Defendant, states as follows:

1. Plaintiff is a Delaware corporation with its principal office relocated in New York City, New York.

2. Defendant Revenue Division of the Department of Treasury, State of Michigan is the statutorily designated agency of state government charged with responsibility for administration and enforcement of the Michigan Single Business Tax Act imposed pursuant to 1975 Public Act 228, MCL 208.1, *et seq*; MSA 7.558(1), *et seq* ("SBTA").

3. The taxes involved are Michigan single business taxes for the fiscal years ended February 28, 1990 ("fiscal year 1990"); February 28, 1991 ("fiscal year 1991"); February 29, 1992 ("fiscal year 1992") and February 28, 1993 ("fiscal year 1993") (collectively referred to as the "years in issue").

4. Plaintiff timely filed Michigan single business tax returns for fiscal years 1990 and 1991.

5. Plaintiff did not file Michigan single business tax returns for fiscal years 1992 and 1993.

6. As a result of a field audit conducted by the auditors of Defendant relating to the years in issue, Defendant issued to Plaintiff Bill for Taxes Due (Intent to Assess) H231915 on October 13, 1994, alleging a single business tax liability of $112,870 and interest in the amount of $15,341.18, for a total amount of $128,211.18 relating to fiscal years 1992 and 1993.

7. As a result of the field audit, Plaintiff realized that it had erroneously filed tax returns for fiscal years 1990 and 1991 and requested a refund.

8. Plaintiff timely requested an informal conference on the question of its liability for the tax which Defendant proposed to assess for fiscal years 1992 and 1993 and the

refund which Plaintiff requested for fiscal years 1991 and 1992.

9. On July 25, 1995, an informal conference was conducted by Mary J. Weseloh, Referee in Conference, resulting in a recommendation contained in a memorandum dated November 10, 1995, a copy of which is attached hereto as Exhibit 1.

10. Defendant issued to Plaintiff Bill for Taxes Due (Final Assessment) H231915 on March 11, 1996, alleging a single business tax liability of $112,870.00 and interest in the amount of $27,992.73, for a total of $140,862.73 relating to fiscal years 1992 and 1993, and denying the refund claimed by Plaintiff for fiscal years 1990 and 1991. A copy of Bill for Taxes Due (Final Assessment) H231915 is attached hereto as Exhibit 2.

11. On April 15, 1996, Plaintiff paid Defendant, under protest, the amount of $140,862.73 relating to Bill for Taxes Due (Final Assessment) H231915. A copy of the letter that accompanied that payment is attached hereto as Exhibit 3.

12. Plaintiff hereby sues for a refund of single business taxes paid in the aggregate amount of $241,756.73, plus statutory interest, costs, and attorneys fees.

13. The issuance by Defendant of Bill for Taxes Due (Final Assessment) H231915 and the denial of the refund claims is a result of Defendant's conclusion that Plaintiff was subject to the Michigan single business tax for the years in issue.

14. Plaintiff manufactures in Pennsylvania and sells everywhere a product line consisting of picture products,

gum, candy and confection toys (hereinafter "the Products").

15. All requests for purchases of the Products by customers of Plaintiff are sent to the headquarters of Plaintiff located in New York City.

16. All requests for purchases of the Products are accepted and approved by the Credit Manager of Plaintiff located in New York City.

17. During the years in issue, two employees of Plaintiff were resident in the state of Michigan.

18. Plaintiff's employees within the state of Michigan served as sales representatives.

19. The sales representatives of Plaintiff resident in Michigan were each furnished by Plaintiff with an automobile leased by Plaintiff from a leasing company located in the state of Minnesota.

20. Plaintiff does not maintain an office, mailing address or telephone listing in the state of Michigan.

21. The sales representatives of Plaintiff resident in the state of Michigan called upon customers located in Michigan and three other states and solicited requests for purchases of the Products of Plaintiff.

22. 15 USC 381, commonly referred to as Public Law ("PL") 86-272, prohibits a state from imposing a net income tax on the income derived from interstate commerce if the person's only business activities within the state are the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by shipment or delivery from a point

outside the state. A copy of PL 86-272 is attached hereto as Exhibit 4.

23. The sales representatives of Plaintiff resident in the state of Michigan engage in only those activities which constitute the solicitation of requests for purchases of the Products defined by and protected from state income taxation by federal law.

24. Plaintiff's sales representatives have possession of samples of the Products in Michigan.

25. Samples of the Products are given away by Plaintiff's sales representatives to current and potential customers.

26. Samples of the Products are not sold by Plaintiff's sales representatives to customers located in the state of Michigan.

27. Plaintiff's sales representatives must account to Plaintiff for samples of the Products in their possession used in the solicitation of requests for purchases of the Products.

28. In connection with its responsibility to administer the SBTA, Defendant promulgated Single Business Tax Bulletin 1980-1 (May 1, 1980), entitled *Single Business Tax – Jurisdictional Standard*, and Revenue Administrative Bulletin 1989-46 (approved: May 31, 1989), entitled *Single Business Tax Jurisdictional Standard* ("RAB 89-46"). Copies of SBT Bulletin 1980-1 and RAB 89-46 are attached hereto as Exhibits 5 and 6.

29. Defendant issued SBT Bulletin 1980-1 and RAB 89-46 pursuant to the SBTA.

30. SBT Bulletin 1980-1 and RAB 89-46 describe the jurisdictional standard to be used in determining whether or not a person engaged in business activity has sufficient nexus with Michigan so as to become subject to taxation under the SBTA.

31. SBT Bulletin 1980-1 and RAB 89-46 declare the jurisdictional standard of the SBTA to be that expressed by PL 86-272 and the court cases decided thereunder.

32. SBT Bulletin 1980-1 and RAB 89-46 were issued by Defendant in order to provide guidance to persons engaged in business activity as to the jurisdictional standard to be used by the Department in determining whether or not a person is taxable under the SBTA.

33. In issuing SBT Bulletin 1980-1 and RAB 89-46, the Department expected and intended persons engaged in business activity to have, and rely upon, the guidance of the Department as to the jurisdictional standard under the SBTA expressed in SBT Bulletin 1980-1 and RAB 89-46.

34. In reliance upon SBT Bulletin 1980-1 and RAB 89-46, Plaintiff organized and conducted its business activity within the state of Michigan in order to come within the protections afforded by PL 86-272, as adopted by Defendant under SBT Bulletin 1980-1 and RAB 89-46, as the jurisdictional standard for the SBTA.

35. In *The Gillette Company v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), the Michigan Court of Appeals held that the single business tax is not a tax imposed on or measured by net income, and that the restriction imposed by PL 86-272 does not apply to the

single business tax. The decision in *Gillette* was issued March 1, 1993.

36. The decision of the Court in *Gillette* that PL 86-272 does not apply to the SBTA

a. established a new principle of law;

b. overruled clear past precedent

i) on which Plaintiff had relied; and

ii) on which Defendant had relied;

c. decided an issue of first impression;

d. was a determination on the jurisdictional standard for the SBTA which Defendant had not expected; and

e. was not clearly foreshadowed.

37. Plaintiff could have arranged to solicit requests for purchase of the Products by customers in the state of Michigan in a manner different from those activities characterized in SBT Bulletin 1980-1 and RAB 89-46 as immune activity during the years in issue.

38. Defendant may not apply a judicial interpretation of a taxing statute to business activity occurring prior to the issuance of the court decision where a person engaging in business activity has relied upon the interpretation given to the statute by the state agency charged with administration of the statute in an official pronouncement by that agency which purports to be an authoritative interpretation of the statute, which is overturned by the court decision.

WHEREFORE, Plaintiff prays that this Court find and determine as follows:

(1) That, for the years in issue, the taxability of Plaintiff under the SBTA should be determined in accordance with the nexus standard enunciated in SBT Bulletin 1980-1 and RAB 89-46; and

(2) That, in accordance with the jurisdictional standard enunciated in SBT Bulletin 1980-1 and RAB 89-46, Plaintiff was immune from taxation under the SBTA;

(3) That Plaintiff be awarded a refund of $241,756.73 in single business tax and interest paid, plus additional interest pursuant to statute;

(4) That Plaintiff is entitled to its costs and reasonable attorneys fees incurred in the prosecution of this matter; and

(5) That Plaintiff shall have such other and further relief as this Court shall determine to be permitted by law and to which Plaintiff is justly entitled.

Respectfully submitted:

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ATTORNEYS, P.C.
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THE TOPPS COMPANY, INC.

By: /s/ Charles Vartanian

Its: /s/ Tax Manager

Dated: June 7, 1996

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

On this 6th day of June, 1996, personally appeared before me Charles Vartanian, the Tax Manager for the Plaintiff in the within cause, and stated that HE has read the foregoing Complaint and that HE believes the contents thereof to be true to the best of HIS knowledge, information and belief.

/s/ Leon J. Gutman
Leon J. Gutman, Notary Public
County, New York

My commission expires:
LEON JACK GUTMANN
Notary Public, State of New York
No. 01-GU6709935
Qualified in New York County
Commission Expires August 31, 1996

MOTION FILED

SEP 5 2000

(2)

No. 00-0186

In The
Supreme Court of the United States

TOPPS COMPANY, INC.

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court of Appeals of the State of Michigan

BRIEF OF *AMICUS CURIAE*, THE GILLETTE COMPANY, IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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MOTION TO APPEAR AS *AMICUS CURIAE*

NOW COMES The Gillette Company ("Gillette") and, pursuant to Supreme Court Rule 37.2(b), moves this Honorable Supreme Court to allow Gillette to appear as *Amicus Curiae* in this cause and to file with this Court its Brief of *Amicus Curiae* The Gillette Company in Support of Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan. In support of its Motion, Gillette states as follows:

1. On August 22, 2000, and pursuant to Supreme Court Rule 37.2(a), Petitioner, The Topps Company ("Topps"), granted Gillette consent to appear as *amicus curiae* in this cause.

2. On August 24, 2000, and pursuant to Supreme Court Rule 37.2(a), counsel for Gillette contacted counsel for Respondent, the Michigan Department of Treasury ("the Department"), to seek the Department's consent to Gillette appearing as *amicus curiae* in this cause. The Department declined to grant consent, stating that it did not believe that this cause is important enough to warrant a brief in opposition to the Petition for Writ of Certiorari and, therefore, would not consent to Gillette's request to appear as *amicus curiae*. Therefore, Gillette submits this Motion and Brief in accordance with Supreme Court Rule 37.2(b).

3. From 1980 to 1993, the Department issued Bulletins declaring Public Law 82-272, codified as 15 U.S.C. §381 ("PL 86-272"), as Michigan's single business tax ("SBT") nexus/jurisdictional test. PL 86-272 is federal legislation that prohibits a state from taxing an out-of-state business if the only activities in state are the "solicitation of orders". The Department also issued Bulletins informing taxpayers that the Department would be bound by its Bulletins declaring PL 86-272 as the jurisdictional test and, therefore, taxpayers could rely on such Bulletins in organizing and conducting their business activities in Michigan. Gillette relied on the Department's Bulletins and organized and restricted its business activities in

Michigan to avoid liability under Michigan's Single Business Tax Act, Mich. Comp. Laws § 208.1 et seq. ("SBTA").

4. Gillette was the first taxpayer to challenge the Department's assertion of SBT liability against it under PL 86-272. Gillette engaged in extensive litigation with the Department concerning whether Gillette's activities in Michigan, during the tax years 1976 to 1981, exceeded the protection of PL 86-272.

5. In 1993, and long after Gillette engaged in conduct that the State assured would not give rise to SBT liability, the Department retroactively abandoned and rescinded its previously issued Bulletins declaring PL 86-272 as the jurisdictional standard. The Department instead applied the much broader due process and commerce clause nexus standards enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("the DP/CC test"), and held applicable to Michigan's SBT by the Michigan Court of Appeals' *sua sponte* decision in *The Gillette Comp. v Michigan Dept. of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993), *lv. den.* 519 N.W.2d 156 (1994), *cert. den.* 130 L.Ed.2d 673 (1995).

6. Gillette is the first "victim" of the State's retroactive imposition of SBT liability under the DP/CC test, and has been subjected to the severest penalties imposed by the Department – retroactive collection of SBT taxes back to 1976.

7. The effect of the Department's retroactive application of the DP/CC test is to subject Gillette, Topps, and many other out-of-state businesses, to significant SBT liability and penalties for years in which the Department assured such taxpayers that no SBT liability would be imposed. The Department has effectively imposed punishment for past conduct that was lawful when it took place.

8. Gillette, like Topps and many other out-of-state businesses, is adversely affected by Michigan's retroactive

application of a new and unanticipated single business tax jurisdictional standard to those out-of-state businesses who relied on the Department's previously published jurisdictional standard. Gillette, Topps, and all other out-of-state businesses, are without a "political voice" in Michigan. The Michigan Courts have been unwilling to protect their constitutional right to due process; they must therefore rely on this Court to do so.

9. The Court of Appeals Opinion (which Topps requests this Court to issue a writ of certiorari to review), if permitted to stand, will send a signal to state agencies that they are in effect immune from the limitations imposed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. Amend. XIV, §1. The Opinion of the Michigan Court of Appeals, if permitted to stand, will permit state agencies to renege on binding promises long after taxpayers had relied on such promises and had engaged in conduct they were assured was lawful when it took place.

WHEREFORE, Gillette respectfully requests that this Court grant its Motion to appear as *Amicus Curiae* and allow it to file the attached Brief of *Amicus Curiae*, the Gillette Company in Support of Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION TO APPEAR AS AMICUS CURIAE i

TABLE OF AUTHORITIES vi

INTEREST OF AMICUS CURIAE THE GILLETTE COMPANY 1

SUMMARY OF ARGUMENT 3

I. HISTORY BEHIND MICHIGAN'S ADOPTION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD AND THE DEPARTMENT'S RETROACTIVE RESCISSION OF THIS STANDARD 3

A. Enter the Michigan Court of Appeals 5

B. The Department of Treasury – Well Aware that the SBT Is Not An Income Tax – Nevertheless Administratively Adopted and Uniformly Applied PL 86-272 As The SBTA Jurisdictional Standard 6

ARGUMENT 7

II. THE DEPARTMENT'S RETROACTIVE APPLICATION OF THE DP/CC JURISDICTIONAL TEST UNCONSTITUTIONALLY DEPRIVES TOPPS, GILLETTE, AND OTHER TAXPAYERS THAT RELIED ON THE DEPARTMENT'S PUBLISHED BULLETINS DECLARING PL 86-272 AS THE JURISDICTIONAL TEST, THEIR DUE PROCESS RIGHTS 7

A. The Department's Administrative Actions Following the Court Of Appeals' Decision In *Gillette* 7

B. This Case Cannot be Disposed of by Concluding that the Court of Appeals in its *Gillette* Decision Invalidated PL 86-272 as the Jurisdictional Standard.....9

C. The Guarantee of Due Process of Law Requires Uniform Prospective Application of the New DP/CC Jurisdictional Test Announced in *Gillette*.....13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Pages

Bowen v. *Georgetown Univ. Hospital,*
Id., 488 U.S. 204 (1988) 15, 16

Clark-Cowlitz Joint Operating Agency v. *FERC, et al.,*
826 F. 2d 1074 (D.C. Cir. (1987)) 10

Cosmair, Inc. v. *Department of Treasury,*
No. 198240 (Mich. Ct. App. 1998) 8

City of El Paso v. *Simmons,*
379 U.S. 497 (1965) 13

General Motors Corp. v. *Romein,*
503 U.S. 181 (1992) 15

The Gillette Comp. v. *Michigan Department of Treasury,*
497 N.W.2d 595 (1993),
lv. den. 445 Mich. 860 (1994)
cert. den. 130 L.Ed.2d 673 (1995) ..... Passim

The Gillette Comp. v. *Dep't of Treasury,*
Nos. 73916, 90676-7,
Mich. St. Tax Rep. (CCH) 201-246
(Mich. Tax Trib.) 4

Heckler v. *Community Health Services of Crawford*
County, Inc., et al, 467 U.S. 51 (1984) 16

Helvering v. *R.J. Reynolds Tobacco Co.,*
306 U.S. 110 (1939) 14, 15

Kaiser Aluminum & Chemical Corp. v. *Bonjorno*,
494 U.S. 827 (1990) 2, 15

Landgraf v. *USI Film Products, et al.*
511 U.S. 244 (1994) 13, 15

Lemon, et al. v. *Kurtzman, et al.*,
411 U.S. 192 (1973) 10

MCI Telecommunications Corp. v. *Department of Treasury*,
355 N.W.2d 627 (Mich. Ct. App. 1984) 10

Mobil Oil Corp. v. *Department of Treasury*,
373 N.W.2d 730 (1984) 6

Nashville Chattanooga & St. Louis. Railway v. *Browning, et al.*,
310 U.S. 362 (1940) 14

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) ..... ii, 2

St. Regis Paper Co. v. *U.S.*,
368 U.S. 208 (1961) 11

Syntex Laboratories, Inc. v. *Department of Treasury*,
590 N.W. 2d 612 (Mich. Ct. App. 1998),
lv. den. 607 N.W. 2d 726 (Mich. 2000) 8, 10

Town & Country Dodge, Inc. v. *Department of Treasury*,
394 N.W.2d 472 (1986) 6

Trinova Corp. v. *Department of Treasury*,
445 N.W.2d 428 (1989),
aff'd, 498 U.S. 358 (1991) 3, 6

Welch v. *Henry*,
305 U.S. 134 (1938) 6

Wisconsin Department of Revenue v. *Wrigley, Co.*,
505 U.S. 214 (1992) 2, 5

Wismer & Becker Contracting Engineers v.
Department of Treasury, 382 N.W.2d 505 (1985) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV, § 1 iii

STATUTES

Federal

15 U.S.C. § 381 ..... passim

Michigan

MICH. COMP. LAWS § 24.201 9

MICH. COMP. LAWS § 24.203(6) 9

MICH. COMP. LAWS § 205.1 8

MICH. COMP. LAWS § 205.3 8

MICH. COMP. LAWS § 205.30c 8

MICH. COMP. LAWS § 208.1 ..... ii, 1

MICH. COMP. LAWS § 208.41 ..... 2, 9

MICH. COMP. LAWS § 208.42 2

MICH. COMP. LAWS § 208.45 2

U.S. SUPREME COURT RULES

Rule 37.2 i

MISCELLANEOUS

Opper, *Constitutional Aspects of the Single Business Tax Act,*
22 Wayne L. Review 1167 (1976) 6

Smead, *The Rule Against Retroactive Legislation A Basic Principle Of Jurisprudence,*
20 Minn. L. Rev. 775 (1936) 15

2 J. Story, *Commentaries on the Constitution of the United States* §1398, p. 272 (5th ed. 1891) 15

Munzer, *A Theory of Retroactive Legislation,*
61 Texas L. Rev. 425 (1982) 16

Interest of *Amicus Curiae* The Gillette Company

This brief is submitted by The Gillette Company ("Gillette") as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan filed by Petitioner, The Topps Company, Inc.[1] Gillette, as well as hundreds of other out-of-state businesses, are adversely affected by Michigan's retroactive rescission and abandonment of its administratively adopted Single Business Tax Jurisdictional standard that was in effect for more than thirteen years.

From 1980 to 1993, the Michigan Department of Treasury ("the Department") declared to the world in published Bulletins that it would use Public Law 86-272, codified as 15 U.S.C. §381, as the administratively adopted jurisdictional test under the Michigan Single Business Tax Act, Mich. Comp. Laws. §208.1 et seq. ("SBTA").[2] Gillette relied upon the Department's published Bulletins and organized and restricted its business activities in Michigan so as to avoid liability under the SBTA.[3] In 1993, the Department reversed course and abandoned PL 86-272 as the jurisdictional standard to be applied to the SBTA and retroactively applied the due

[1] Counsel for Gillette authored this *amicus curiae* brief in whole, and no other entity, other than Gillette, made a monetary contribution to the preparation and filing of this brief.

[2] PL 86-272 prohibits a state from imposing a net income tax on the income derived from interstate commerce if the person's only business activities within the state are the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by shipment or delivery from a point outside the state. (See App. 18-19 to Petitioner's Petition for Writ of Certiorari.)

[3] The Department issued Single Business Tax Bulletin 1980-1 (May, 1980), entitled *Single Business Tax Jurisdictional Standard* (App. 38-42 to Petitioner's Petition for Writ of Certiorari), and Revenue Administrative Bulletin 1989-46 (approved: May 31, 1989), entitled *Single Business Tax Jurisdictional Standard* ("RAB 89-46") (App 43-50 to Petitioner's Petition for Writ of Certiorari), to notify persons engaged in business that it had administratively adopted PL 86-272 as the jurisdictional standard for determining taxability under the SBTA.

process/commerce clause test ("DP/CC test") enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The DP/CC test is much easier to meet than the PL 86-272 test. Under the DP/CC test, a multi-state business with a Michigan resident employee would be subject to Michigan's single business tax ("SBT") jurisdiction.[4] The Department's retroactive abandonment and rescission of PL 86-272 resulted in SBT liability for hundreds of out-of-state businesses, including Gillette and Topps, for past years during which the Department had assured such businesses that they would not be liable for SBT taxes if they confined their business activities in Michigan to those protected by PL 86-272. The State of Michigan, through its Department of Treasury, effectively declared past lawful conduct to be "unlawful" and subject to severe penalties. The State of Michigan has eviscerated the fundamental principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring.)

The retroactive rescission of PL 86-272 as the SBTA jurisdictional test further penalized Topps, Gillette, and other out-of-state businesses by subjecting Topps, Gillette, and others, to multiple taxation. Under the SBTA (and the Uniform Division of Income for Tax Purposes Act ("UDITPA") 7A U.L.A. 356 (1999), a taxpayer whose business activities are taxable both within and without the State, is required to apportion its tax base.[5] In reliance on the Department's Bulletins declaring PL 86-272 as the SBT jurisdictional test, Gillette reasonably believed it was not taxable in Michigan and apportioned 100% of its income to its home state.[6] The Department's retroactive rescission of PL 86-272, and the

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[4] See *Wisconsin Department of Revenue v. Wrigley, Co.*, 505 U.S. 214 (1992), for the type of "immune activities" protected from state taxation under PL 86-272.

[5] See App. 28-34, 36-37 to Topps' Petition for Writ of Certiorari.

[6] See Mich. Comp. Laws, §§ 208.41, 208.42, 208.45 (See App. 28-31 and App. 36-37 to Topps' Petition for Writ of Certiorari.)

retroactive application of the DP/CC test as the SBT jurisdictional test, subjects Gillette to multiple taxation. Further, the period of limitations to seek refunds or credits for SBT taxes paid has long expired.

SUMMARY OF ARGUMENT

I. HISTORY BEHIND MICHIGAN'S ADOPTION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD AND THE DEPARTMENT'S RETROACTIVE RESCISSION OF THIS STANDARD.

Michigan enacted its Single Business Tax ("SBT") effective January 1, 1976. Mich. Comp. Laws §§ 208.1 et seq. The SBT, a modified value added tax[7], replaced Michigan's corporate income tax. In 1973, when Michigan's corporate income tax was in effect, Gillette determined that it would restrict its activities in Michigan to those permissible as sales solicitation under PL 86-272. The Department audited Gillette for the years 1974 and 1975, and concluded that PL 86-272 precluded the imposition of the Michigan corporate income tax. In 1976, Michigan enacted the SBTA, Mich. Comp. Laws § 208.1 et seq. As part of the same audit of Gillette's 1974 and 1975 corporate income taxes, the Department also audited Gillette for 1976 under the SBTA. The Department concluded that PL 86-272 was applicable only to income taxes, and since the SBT was not an income tax, it determined PL 86-272 did not apply to the SBTA and issued a SBT deficiency assessment against Gillette for the year 1976. SBT tax years 1977 through 1981 were later added to Gillette's SBT deficiency assessments.

Gillette protested the Department's SBT assessments for years 1976 through 1981. During the exhaustion of Gillette's administrative remedies, and before the SBT assessments were finalized, the Department concluded that it would, as a matter of administrative policy, apply PL 86-272 as

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[7] *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358 (1991).

the jurisdictional test under the SBTA. This determination was confirmed by the Department in 1980 in its published Single Business Tax Bulletin 1980-1 (App. 38-42 to Petitioner's Petition for Writ of Certiorari), and subsequently reconfirmed in 1989 by the Department in its published Revenue Administrative Bulletin ("RAB") 89-46, entitled "Single Business Tax – Jurisdictional Standard." App. 43-50 to Petitioner's Petition for Writ of Certiorari.[8] The Department nevertheless finalized and issued the 1976 to 1981 SBT assessments against Gillette, asserting that Gillette's activities exceeded that "solicitation" permitted by PL 86-272.

Gillette proceeded to trial in the Michigan Tax Tribunal, challenging the Department's assertion of SBT jurisdiction for years 1976-1981 under PL 86-272, the only jurisdictional standard the Department declared was applicable in Michigan. During the litigation, Gillette verified, and re-verified, that the Department had uniformly applied PL 86-272 as the SBTA jurisdictional test, and that such jurisdictional test was the only jurisdictional test the State applied and would assert in the Gillette litigation.[9]

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[8] In 1989, the Department also issued RAB 89-34, App. 51-55 to Petitioner's Petition for Writ of Certiorari, assuring taxpayers that the jurisdictional standard announced in its Bulletins could be relied on and were binding on the Department. The Department, in its Bulletins, effectively assured taxpayers that there would be no retroactive change in its position, and that taxpayers could rely on the assurances published by the Department in organizing and conducting its business activities in Michigan so as to avoid SBT liability.

[9] On February 13, 1989, the Tax Tribunal concluded that Gillette's activities exceeded that solicitation permitted by PL 86-272, and affirmed the assessments for years 1976 to 1981. *The Gillette Company v. Dep't of Treasury*, Nos. 73916, 90676-7 Mich. St. Tax Rep. (CCH) 201-246 (Mich. Tax Trib. February 13, 1989).

A. Enter the Michigan Court of Appeals.

On June 23, 1989, Gillette appealed to the Michigan Court of Appeals the decision of the Michigan Tax Tribunal.[10] Both the Department and Gillette devoted their appellate briefs to whether Gillette's activities exceeded PL 86-272. PL 86-272 was the only jurisdictional test the parties briefed and argued. The Court of Appeals panel focused all of their questioning at oral arguments on whether Gillette's activities were protected by PL 86-272.[11]

On March 1, 1993, the Michigan Court of Appeals issued its Opinion in *Gillette*, holding *sua sponte*, that PL 86-272 was not the appropriate jurisdictional test to be applied to the SBT, and adopted instead the DP/CC test enunciated in *Quill*. The Court of Appeals, believing the parties had "overlooked" the issue, stated, "Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case." 497 N.W.2d at 597. The Court of Appeals concluded that, because the SBT is not an income tax, or a tax measured by income, PL 86-272 did not apply. 497 N.W.2d at 598-99. The Court of Appeals affirmed the SBT assessments against Gillette for years 1976-1981 under the DP/CC test.

The Court of Appeals simply misunderstood the facts and the case before it. It had been established for many years that the SBT was not a tax imposed on or measured by net income, and therefore, PL 86-272 by its literal terms, would not

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[10] The Court of Appeals opinion is reported at *The Gillette Comp. v. Dep't of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993), *lv den* 445 Mich. 861 (1994), *cert. den.* 513 U.S. 1103 (1995).

[11] After oral arguments, but before the Court of Appeals issued its decision, this Supreme Court issued its decision in *Wisconsin Dep't of Revenue v. Wrigley Co.*, 505 U.S. 214 (1992). The *Wrigley* decision involved the first construction of the "solicitation of orders" language in PL 86-272. Gillette filed a supplemental brief with the Court of Appeals, bringing the *Wrigley* decision to its attention.

apply.[12] The Michigan appellate courts had also recognized this fact nearly ten years before the *Gillette* decision.[13]

B. The Department of Treasury – Well Aware that the SBT Is Not An Income Tax – Nevertheless Administratively Adopted and Uniformly Applied PL 86-272 As The SBTA Jurisdictional Standard.

In 1980, and again in 1989, the Department declared to the world through its published Bulletins that it would apply PL 86-272 as its SBTA jurisdictional test. The Michigan Legislature, for more than 17 years, acquiesced in the PL 86-272 standard.[14] In 1993, the Department reversed course and retroactively abandoned and rescinded PL 86-272 as the jurisdictional standard and retroactively imposed the DP/CC test to 1989.[15] The effect of the Department's retroactive imposition of a new SBT jurisdictional test is to subject out-of-state businesses to SBT liability and penalties for years during which the Department assured such taxpayers no SBT liability would be asserted.

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[12] *See, e.g.*, Opper, *Constitutional Aspects of the Single Business Tax Act*, 22 Wayne L. Review 1167, 1167-1171 (1976), quoting from the Department's *Single Business Tax Questions and Answers* (June 5, 1976), "We conclude that the SBT is not an income tax or measured by net income, that [15 USC §381 (1976)] will not be used to determine nexus.

[13] *See, Trinova Corp. v. Dept. of Treasury*, 445 N.W.2d 428 (Mich. 1989), *aff'd* 498 U.S. 358 (1991), *Mobil Oil Corp. v. Dept. of Treasury*, 373 N.W.2d 730 (Mich. 1984); *Town & Country Dodge, Inc. v. Dept. of Treasury*, 394 N.W.2d 472 (Mich. App. 1986), *Wismer & Becker Contracting Engineers v. Dept. of Treasury*, 382 N.W.2d 505 (Mich. App. 1985).

[14] The Single Business Tax was amended over 45 times during the 1976-1993 interim, yet not once did the Legislature in the course of its "revision of tax laws to distribute increased costs of government among its taxpayers in the light of present need for revenue," suggest a different jurisdictional test to be applied. (See *Welch v. Henry*, 305 U.S. 134, 149 (1938).)

[15] *See infra* note 17.

ARGUMENT

II. THE DEPARTMENT'S RETROACTIVE APPLICATION OF THE DP/CC JURISDICTIONAL TEST UNCONSTITUTIONALLY DEPRIVES TOPPS, GILLETTE, AND OTHER TAXPAYERS THAT RELIED ON THE DEPARTMENT'S PUBLISHED BULLETINS DECLARING PL 86-272 AS THE JURISDICTIONAL TEST, THEIR DUE PROCESS RIGHTS

A. The Department's Administrative Actions Following the Court Of Appeals' Decision In *Gillette*

The Court of Appeals' *Gillette* decision *sua sponte* held the PL 86-272 jurisdictional test administratively adopted and uniformly applied by the Department for more than 17 years[16] inapplicable, and held the much broader and easier-met DP/CC test applicable to Gillette for the tax years there at issue, 1976 through 1981. Following the *Gillette* decision, the Department, without legislative authority, retroactively abandoned and rescinded its prior Bulletins declaring PL 86-272 as the applicable jurisdictional test and applied the DP/CC test

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[16] The Department applied PL 86-272 as the SBT jurisdictional standard from 1976 until 1993 when the *Gillette* decision was issued.

retroactively to 1989 for hundreds of out-of-state businesses.[17] The retroactive application of the DP/CC test subjects Topps, Gillette, and other taxpayers, to retroactive SBT liability for years pre-dating the 1993 *Gillette* decision.

The Michigan Commissioner of Revenue and the Department of Treasury derive their authority to administer the SBTA solely from the Department of Revenue Act, MICH COMP. LAWS § 205.1 (the "Revenue Act"). Section 3(f) of the Revenue Act, MICH. COMP. LAWS. § 205.3(f), authorizes the Department to issue bulletins "that index and explain current department interpretations of current state tax laws." (App. 22-25 to Petitioner's Petition for Writ of Certiorari). The Michigan Administrative Procedures Act ("MAPA"), MICH. COMP. LAWS.

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[17] For hundreds of out-of-state businesses that the Department located and identified following the *Gillette* decision, the Department applied the new DP/CC test retroactively to 1989. Yet for a handful of other out-of-state businesses, including *Amicus* Gillette, the Department has assessed and has attempted to collect SBT taxes back to 1976. The other taxpayers that were subject to SBT taxes for years prior to 1989, of which *Amicus* Gillette is aware, include Syntex Laboratories (see *Syntex Laboratories, Inc. v Dept of Treasury*, 590 N.W. 2d 612 (Mich. Ct. App. 1998), *lv. den.* 607 N.W. 2d 726 (Mich. 2000), and *Cosmair, Inc.* (see *Cosmair, Inc. v. Dep't of Treasury*, No. 198240 (Mich. Ct. App. 1998), *cert. den.* 145 L.Ed.2d 934 (2000).)(App. 1a - 4a and App. 5a.) Yet further, and for the substantial majority of the thousands of taxpayers the Department located after the *Gillette* decision, the Department has prospectively applied the DP/CC test for years beginning in 1993. The Department, for the benefit of the majority of out-of-state businesses that had relied on PL 86-272 as Michigan's SBTA jurisdictional standard, sought and obtained a legislative "fix" to the problems wrought by the Court of Appeals *sua sponte* decision in *Gillette*. Under this new legislation, MICH. COMP. LAWS § 205.30c (App. 6a - 10a), thousands of taxpayers that did not comply with the Department's demand in 1993 to file SBT returns and remit SBT taxes retroactively for years starting in 1989 under the new DP/CC test, are now permitted to do so starting with the 1993 tax year, the year the *Gillette* decision was issued, with prior years SBT liability forgiven.

§ 24.201, *et seq.*, establishes that guidelines of administrative agencies, like the Department of Treasury Bulletins, are binding on the agency that promulgates them. MICH. COMP. LAWS. § 24.203(6) (1979) (App. 20-21 to Petitioner's Petition for Writ of Certiorari). In 1989, in Revenue Administrative Bulletin 1989-34, the Department assured taxpayers that its Bulletins were binding on the Department, had the status of precedent, and could be relied upon by taxpayers. (App. 51-55 to Petitioner's Petition for Writ of Certiorari.) Nowhere in the Revenue Act or the MAPA is the Department given statutory authority to retroactively abandon or rescind its Bulletins.

B. This Case Cannot be Disposed of by Concluding that the Court of Appeals in its *Gillette* Decision Invalidated PL 86-272 as the Jurisdictional Standard.

The Court of Appeals in this case erroneously held,

> Defendant [the Department] did not change its position regarding plaintiff's [Topp's] immunity from taxation under the SBTA, but rather was required by this Court to change its policy... [I]n this case, defendant changed its position only *after it was forced to do so* by an order of this Court. *Gillette*, *supra*, 198 Mich. App. 311.

(App. 10 to Petitioner's Petition for Writ of Certiorari). The Court of Appeals was wrong. The *Gillette* decision did not "force" the Department to retroactively change its administratively adopted PL 86-272 jurisdictional test. The Department, by administrative action, and without specific statutory authority, retroactively changed the jurisdictional test. Following the *Gillette* decision, the Department could have, and should have, prospectively applied the new DP/CC jurisdictional test uniformly to all taxpayers who relied on the

Department's previously issued and published Bulletins declaring PL 86-272 as the jurisdictional test. This the Department has admitted it could have done,[18] this is what Michigan case law clearly permits could have been done (see *MCI Telecommunications Corp. v. Dep't. of Treasury*, 355 N.W.2d 627, 632 (Mich. Ct. App. 1984) (Department of Treasury could adopt post-appellate decision policies [i.e., prospective application] of either taxing or not taxing similarly situated taxpayers). And, more importantly, this is what the Due Process Clause of the U.S. Constitution (U.S. Const., amend. XIV, §1) demands should have been done.

The rule of law is premised on a concept of reliance. See, *Lemon, et al. v. Kurtzman, et al.*, 411 U.S. 192, 198-99 (1973). See also, *Clark-Cowlitz Joint Operating Agency v FERC, et al.*, 826 F. 2d 1074, 1100 (D.C. Cir. (1987)) (Mikva, J., dissent). The State of Michigan, through its Department of Treasury, assured taxpayers that they could rely on its published Bulletins and that its Bulletins would not retroactively change. Out-of-state businesses relied on the Department's Bulletins and restricted their activities in Michigan in conformity with PL 86-272 so as to avoid SBT liability. The State breached its promise long after taxpayers organized and conducted their Michigan business activities in reliance upon the State's promise. The Court of Appeals decision in *Topps* glossed over the Department's broken promises and the damage caused thereby by offering the excuse that the Department simply did what the Court of Appeals decision in *Gillette* required it to do. The Court of Appeals decision in this case turns the "concept of reliance" on its head and marks a stark departure from the "rule of law."

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[18] In *Syntex Laboratories, Inc. v. Dep't of Treasury*, 590 N.W. 2d 612 (Mich. Ct. App. 1998), *lv. den.* 607 N.W. 2d 726 (Mich. 2000), in the Department's Brief in Opposition to Syntex's Application for Leave to Appeal to the Michigan Supreme Court, the Department stated, "First, the Department could have actively attempted to obtain compliance by all taxpayers with *Gillette* for tax years beginning in or after 1993 (the year *Gillette* and *Guardian* were decided). This would have been a viable alternative. (App. 11a - 17a.)

As was appropriately explained by the dissenting opinion of Justice Black, with whom Justices Whittaker and Stewart concurred, in *St. Regis Paper Co. v. U.S.*, 368 U.S. 208, 229 (1961), "[O]ur government should not permit one of its arms [the Court of Appeals] to do that which, ... the Government [the Michigan Department of Treasury] has promised no arm will do." The Court stated:

> "Quite plainly, the promised protection was against governmental 'taxation, investigation or regulation' generally, and, to protect the integrity of that promise, it is of course necessary that all of the particular arms of Government which are engaged in those activities be bound by the Government's pledges. **Our Government should not, by picayunish haggling over the scope of its promises, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do.** It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government. *Cf. Rock Island, Arkansas & Louisiana R. Co. v. United States*, 254 U.S. 141, 143."

(Emphasis added).

This fundamental concept of trust in Government was later reiterated and emphasized by this Court in *Heckler v. Community Health Services of Crawford County, Inc., et al.*, 467 U.S. 51, n.13 (1984), where the Court stated:

> "See generally *St. Regis Paper Co. v. United States*, 368 U.S. 208, 209 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish

> haggling over the scope of its promises, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S., at 387-388 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"); *Brandt v Hickel*, 427 F.2d 53, 57 (CA 9 1970) (**"To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"**); *Menges v. Dentler*, 33 Pa 495, 500 (1859) (**"Men naturally trust in their government, and ought to do so, and they ought not to suffer for it"**). See also *Giglio v. United States*, 405 U.S. 150, 154-155 (1972).

(Emphasis added.) This fundamental principle that those who justifiably rely on promises made by their Government can do so safely, reflects the strong belief of the Framers of the Constitution:

> [M]en should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property. James Madison explained that the people were 'weary of the fluctuating policy' of state legislatures and wanted it made clear that under the new Government men could safely rely on States to keep faith with those who justifiably relied on

> their promises. *The Federalist, No. 44, at 301* (Cooke ed. 1961).

See, *City of El Paso v. Simmons,* 379 U.S. 497, 522 (1965) (Black, dissent). See also, *Landgraf v. USI Film Products, et al.,* 511 U.S. 244, 267 (1994).

Taxpayers, such as Topps and Gillette, were reasonably justified in relying on the Department's published Bulletins. After all, the State gave them written assurances that they could, and should, so rely. The Court of Appeals in this case has effectively held that persons should not, and cannot, rely on assurances made by their Government, for if they do, they proceed at their own peril. This is not good government; and this is certainly not due process of law.

C. The Guarantee of Due Process of Law Requires Uniform Prospective Application of the New DP/CC Jurisdictional Test Announced in *Gillette.*

It is important for this Court to note that the State's retroactive rescission of its previously issued Bulletins, and its retroactive imposition of the DP/CC test, was not done by way of legislative authorization. The Department, by administrative policy, effected a significant retroactive change in an out-of-state businesses' SBT liability for past years during which the Department assured such taxpayers that their SBT liability would be assessed under PL 86-272, in accordance with the Department's published Bulletins. Out-of-state businesses justifiably relied on the Department's published Bulletins and organized and conducted their business activities in Michigan so as to avoid SBT liability. Due Process requires that the pre-1993 SBT liability of these taxpayers be determined in conformity to the PL 86-272 jurisdictional test then in effect. See *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939), "We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the [administrative] regulation then

in force... Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

The SBTA was amended over 45 times during the 1976-1993 period during which the Department uniformly applied PL 86-272 as the SBTA jurisdictional standard. Yet not once during that interim did the Legislature suggest a different jurisdictional test be applied. The Department's more than 17-year uniform application of PL 86-272 as the SBTA jurisdictional test, and the Legislature's implicit approval of that jurisdictional test during the 1976-1993 interim, gave the Department's Bulletins the "force of law ..."[19]

The Court of Appeals likened the actions of the Department to retroactive tax legislation and concluded that there was no due process violation as a result of the Department's retroactive imposition of the DP/CC jurisdictional test. (App. 11-13 to Petitioner's Petition for Writ of Certiorari.) The Court of Appeals' comparison overlooks a critical point and well-established legal principals.

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[19] See, *Nashville C. & S.L.R. Co. v. Browning*, 310 U.S. 362, 369-370 (1940), where the Court stated:

> "It would be a narrow conception of justice to confine the notion of 'laws' to what is found written on the statute books, and to disregard the laws which life has written upon it. *Settled state practice* cannot supplant constitutional guarantees, but it *can establish what is state law ... deeply imbedded traditional ways of carrying out state policy*, such as those of which petitioner claims, are often tougher and truer law than the dead words of the written text."

The Department's published Bulletins declaring PL 86-272 as the SBTA jurisdictional test, and the State's uniform application of that test for more than 17 years, "establishes what is state law."

This Court has repeatedly emphasized that "retroactive legislation has always been looked upon with disfavor." *Bowen v. Georgetown University Hospital, et al.,* 488 U.S. 204, 223 (1988) (Scalia, J., concurring), citing, Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, *20 Minn. L. Rev. 775 (1936)*; 2 J. Story, Commentaries on the Constitution of the United States §1398, p. 272 (5th ed. 1891). See, *Landgraf,* 511 U.S. at 264, 265; *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 842-844, 855-56 (1990) (Scalia, J., concurring). This presumption against retroactive legislation "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf,* 511 U.S. at 265. As the Court recognized in *Landgraf, supra,* "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[20] For that reason, the "***principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.***" (Emphasis added) *Kaiser,* 494 U.S. at 855 (Scalia, J., concurring).

Given the traditional attitude towards retroactive legislation, it is entirely unsurprising, therefore, that state legislators and Congress have been unwilling to confer such power upon governmental administrative agencies. See, *Bowen v. Georgetown University Hospital,* 488 U.S. at 208, 223-24; *Helvering v. R.J. Reynolds,* 306 U.S. at 115-116. And, where an administrative agency lacks express statutory authority to engage in retroactive rule or policy making, the Courts have struck down agencies

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[20] Citing, *General Motors Corp. v. Romein,* 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."), and Munzer, *A Theory of Retroactive Legislation,* 61 Texas L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.")

attempts to do so. In *Helvering, supra,* the Court, while sustaining the power of the Treasury Department to change its interpretative regulations so as to operate prospectively, denied it the power to apply a new or amended regulation retroactively. See, *Bowen, supra; Heckler v. Community Mental Health Services,* 467 U.S. at 61, n.12 (1984).

The Michigan Legislature did not authorize, or intend to authorize, the Department's retroactive repeal of its Bulletins declaring PL-86-272 as the jurisdictional test during the period for which that jurisdictional test was imposed and relied upon by taxpayers. Nowhere in the Revenue Act or the Michigan Administrative Procedures Act is the Department authorized to engage in retroactive rule or policy changes. In fact, just the opposite is true. The administrative bulletins that the Department is statutorily authorized to issue states that they have, "the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied upon by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth within the Bulletin." App. 51-52 to Petitioner's Petition for Writ of Certiorari.

The Court of Appeals decision in this case contradicts the well-established principle that the Michigan Department of Treasury cannot change its Bulletins retroactively. The Due Process Clause of the United States Constitution requires that the Department uniformly apply the new DP/CC SBT jurisdictional test prospectively only.

CONCLUSION

Amicus Curiae, The Gillette Company, supports Topps' Petition for Writ of Certiorari to the Michigan Court of Appeals and prays that this Honorable Supreme Court grant the Petition.

Respectfully submitted,

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DELIB:2179762.1\033519-00003

STATE OF MICHIGAN
COURT OF APPEALS

COSMAIR, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee

UNPUBLISHED
March 20, 1998

No. 198240
Court of Claims

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims denying plaintiff's motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Prior to 1993, the parties believed that PL 80-272, which is codified at 15 USC 381, protected businesses that merely solicited orders in Michigan from being subject to the single business tax under MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.* After closing its Michigan facility in 1983, Plaintiff opined that it was no longer subject to the single business tax, although it nevertheless paid the tax for 1984-88. Defendant, which denied plaintiff's subsequent requests for refunds, disagreed with plaintiff's interpretation of PL 86-272 and twice advised plaintiff that its activities were sufficient to establish defendant's jurisdiction to assess the single business tax. Plaintiff requested that defendant postpone its hearing and final tax assessment until this Court issued its decision in *Gillette Co v Dep 't of Treasury,* 198 Mich App 303; 497 NW2d 595 (1993).

In *Gillette, supra* at 311, this Court found that PL 86-272 was inapplicable to the imposition of the single business tax and

that such taxation would instead depend upon an analysis under the process and commerce clauses ("the DP/CC test"). Ultimately, this Court held that the DP/CC test did not prevent the retroactive imposition of the single business tax against Gillette for tax years 1976-81. *Id.* at 311-314. Defendant subsequently notified nonfiling potential taxpayers who were no longer protected by PL 86-272 that they were subject to defendant's jurisdiction according to the decision in *Gillette;* however, the notice also stated that recipients of the notice would be permitted to voluntarily pay the single business tax for the years 1989-93, with interest but without penalty. Defendant did not send the notice to plaintiff and refused to extend the same option to plaintiff when plaintiff requested it. Plaintiff argues that defendant's retroactive application to plaintiff of the DP/CC test for tax years 1984-88 is a violation of plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom defendant did not apply the test beyond 1989.[1]

We review de novo the decision of the Court of Claims to grant defendant summary disposition. *Gainey Transportation*

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[1] In a related argument, plaintiff asserts that defendant's disparate treatment is also attributable to defendant's "re-adoption" of the test enunciated in PL 86-272, despite this Court's holding in *Gillette, supra.* Specifically, plaintiff argues that defendant used plaintiff's alleged liability under 86-272 to distinguish between plaintiff and the group of non-filing potential taxpayers, which had not been liable for the single business tax under PL 86-272. According to plaintiff, this would an unlawful distinction to draw and would require reversal, much like reversal was required in *Armco, supra,* where the department used an improper means of distinguishing between two groups of taxpayers. However, even assuming that we were willing to engage in the now futile analysis of whether plaintiff is liable under PL 86-272, a resolution of this argument in plaintiff's favor would not alter our holding in this case. Our holding depends on various other factors establishing that plaintiff was not similarly situated to the group receiving defendant's notice and establishing that defendant's disparate treatment had a rational basis. Indeed, it is not the topic or outcome of plaintiff's litigation with defendant that set plaintiff apart from the others but the very fact that the parties were engaged in litigation and therefore were previously known to one another.

Service, Inc v Dep't of Treasury, 209 Mich App 504, 506; 531 NW2d 774 (1995). Although the Court of Claims apparently misconstrued some of plaintiff's arguments, we nonetheless affirm its decision to grant defendant summary disposition as the right result in this case. *General Aviation, Inc v Capital Regional Airport Authority (On Remand)*, 224 Mich App 710, 716; 569 NW2d 883 (1997). We hold that plaintiff's rights were not violated because it was not similarly situated to the class of taxpayers receiving the notice and because there was a rational basis for defendant's disparate treatment.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury,* 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd,* 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

Additionally, a rational basis exists for defendant's disparate treatment. As a threshold matter, we note that plaintiff has

mischaracterized defendant's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance 205.13(h), MSA 7.657(13)(h). Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins, and defendant's limited resources reasonably justify defendant's enforcement decision. Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *St Louis, supra at 73.*
Affirmed.

/s/ Gary K. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 24, 2000

Mr. Samuel John McKim III
Miller, Canfield, et al.
150 West Jefferson, Ste. 2500
Detroit, MI 48226

Re: Cosmair, Inc.
v. Michigan Department of the Treasury
No. 99-928

Dear Mr. McKim:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

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MCLA 205.30c

205.30c. Voluntary disclosure agreements; criteria; persons eligible; relief available; definitions

Sec. 30c (1) Through December 31, 2003, the commissioner, or an authorized representative of the commissioner, on behalf of the department, may enter into a voluntary disclosure agreement with a person who makes application, who is a nonfiler, and who meets 1 or more of the following criteria:

(a) Has a filing responsibility under nexus standards issued by the department after December 31, 1997.

(b) Has a reasonable basis to contest liability, as determined by the commissioner, for a tax or fee administered under this act.

(2) All taxes and fees administered under this act are eligible for inclusion in a voluntary disclosure agreement.

(3) To be eligible for a voluntary disclosure agreement, subject to subsection (1), a person must meet all of the following requirements:

(a) Except as otherwise provided in this subdivision, has had no previous contact by the department or its agents regarding a tax covered by the agreement. For purposes of this subdivision, a letter of inquiry, whether a final letter or otherwise, requesting information under section 21(2)(a) that was sent to a nonfiler shall not be considered a previous contact under this subdivision if the nonfiler sends a written request to the department to enter into a voluntary disclosure agreement not later than June 30, 1999.

(b) Has had no notification of an impending audit by the department or its agents.

(c) Is not currently under audit by the department of treasury or under investigation by the department of state police, department of attorney general, or any local law enforcement agency regarding a tax covered by the agreement.

(d) Is not currently the subject of a civil action or a criminal prosecution involving any tax covered by the agreement.

(e) Has agreed to register, file returns, and pay all taxes due in accordance with all applicable laws of this state for all taxes administered under this act for all periods after the lookback period.

(f) Has agreed to pay all taxes due for each tax covered under the agreement for the lookback period, plus statutory interest as stated in section 23, within the period of time and in the manner specified in the agreement.

(g) Has agreed to file returns and worksheets for the lookback period as specified in the agreement.

(h) Has agreed not to file a protest or seek a refund of taxes paid to this state for the lookback period based on the issues disclosed in the agreement or based on the person's lack of nexus or contacts with this state.

(4) If a person satisifies all requirements stated in subsections (1) and (3), the department shall enter into a voluntary disclosure agreement with that person providing the following relief:

(a) Notwithstanding section 28(1)(e) of this act, the department shall not assess any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the lookback period identified in the agreement.

(b) The department shall not assess any applicable discretionary or nondiscretionary penalties for the lookback period.

(c) The department shall provide complete confidentiality of the agreement and shall also enter into an agreement not to disclose, in accordance with section 28(1)(f), any of the terms or conditions of the agreement to any tax authorities of any state or governmental authority or to any person except as required by exchange of information agreements authorized under section 28(1)(f), including the international fuel tax agreement under chapter 317 of title 49 of the the United States Code, 49 U.S.C. 31701 to 31708. The department shall not exchange information obtained under this

section with other states regarding the person unless information regarding the person is specifically requested by another state.

(5) The department shall not bring a criminal action against a person for failure to report or to remit any tax covered by the agreement before or during the lookback period if the facts established by the department are not materially different from the facts disclosed by the person to the department.

(6) A voluntary disclosure agreement is effective when signed by the person subject to the agreement, or his, her, or its lawful representative, and returned to the department within the time period specified in the agreement. The department shall only provide the relief specified in the executed agreement. Any verbal or written communication by the department before the effective date of the agreement shall not afford any penalty waiver, limited lookback period, or other benefit otherwise available under this section.

(7) A material misrepresentation of the fact by an applicant relating to the applicant's current activity in this state renders an agreement null and void and of no effect. A change in the activities or operations of a person after the effective date of the agreement is not a material misrepresentation of fact and shall not affect the agreement's validity.

(8) The department may audit any of the taxes covered by the agreement within the lookback period or in any prior period if, in the department's opinion, an audit of a prior period is necessary to determine the person's tax liability for the tax periods within the lookback period or to determine another person's tax liability.

(9) Nothing in this section shall be interpreted to allow or permit unjust enrichment as that term is defined in subsection (11). Any tax collected or withheld from another person by an applicant shall be remitted to the department without respect to whether it was collected during or before the lookback period.

(10) The department shall not require a person who enters into a voluntary disclosure agreement to make any filings that are additional to those otherwise required by law.

(11) As used in this section:

(a) "Lookback period" means 1 or more of the following:

(i) The most recent 48-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in the state if less than 48 months.

(ii) For single business taxes levied under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, the lookback period shall be the 4 most recent completed fiscal or calendar years over a 48-month period or the first date the person subject to an agreement under this section began doing business in this state if less than 48 months.

(iii) Notwithstanding subparagraphs (i), (ii), and (iv), the most recent 36-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in this state if less than 36 months, if tax returns filed in another state for a tax based on net income that included sales in the numerator of the apportionment formula that now must be included in the numerator of the apportionment formula under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, and those sales increased the net tax liability payable to that state.

(iv) If there is doubt as to liability for the tax during the lookback period, another period as determined by the commissioner to be in the best interest of this state and to preserve equitable and fair administration of taxes.

(b) "Nonfiler" for a particular tax is a person that has never filed a return for the particular tax being disclosed.

(c) "Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, limited liability company, limited liability partnership, receiver, estate, trust, or any other group or combination acting as a unit.

(d) "Previous contact" means any notification of an impending audit pursuant to section 21(1), review, notice of intent to assess, or

assessment. Previous contact also includes final letters of inquiry pursuant to section 21(2)(a) or a subpoena from the department.

(e) "Unjust enrichment" includes the withholding of income tax under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532, and the collection of any other tax administered by this act that has not been remitted to the department.

(f) "Voluntary disclosure agreement" or "agreement" means a written agreement that complies with this act.

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STATE OF MICHIGAN
IN THE SUPREME COURT

SYNTEX LABORATORIES,

Petitioner-Appellant, Supreme Court No. 115012

v Court of Appeals No. 196546
Michigan Tax Tribunal No. 97852

REVENUE DIVISION OF THE DEPARTMENT
OF TREASURY OF THE STATE OF MICHIGAN,

Respondent-Appellee.
_____/

RESPONDENT-APPELLEE'S ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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Dated: November 18, 1999

TABLE OF CONTENTS

Page

Index of Authorities i

Counterstatement of Questions Involved v

Introduction 1

A. Other Cases Before this Court Involving Similar Issues 1

B. Procedural Summary of This Case 2

C. Background and Overview of Issues 3

Counterstatement of Facts 11

Statement Why The Application Does Not Satisfy The Requirements of MCR 7.302(B) 13

As in Cosmair, Whose Similar Application This Court Has Rejected, The Application In This Case Does Not Present Issues That Involve The Public Interest Or Legal Principles Of Major Significance To The State's Jurisprudence. 13

ARGUMENT 16

I. THE COURT OF APPEALS APPLICATION OF *GILLETTE* AND *GUARDIAN* TO THIS MATTER WAS CORRECT, BECAUSE APPELLATE DECISIONS THAT ARE APPLIED TO PAST EVENTS IN THE LITIGATION BEFORE THE COURT MUST BE APPLIED TO CASES PENDING AT THE TIME THE DECISIONS ARE ISSUED. 16

II. THE DEPARTMENT AND THE COURTS HAVE NOT VIOLATED SYNTEX'S RIGHTS

TO EQUAL PROTECTION AND UNIFORMITY. 20

A. Like Taxpayers in *Cosmair* and *Gillette*, Syntex Was Not Similarly Situated To Nonfiling, Potential SBT Taxpayers. 21

B. The Test For Equal Protection and Uniformity of Taxation Is The Rational Basis Standard 22

C. The Department Had a Rational Basis For Attempting to Obtain Compliance With *Gillette* for the Previous Four Years. 23

D. The Department's Policy of Applying *Gillette* and *Guardian* Retroactively and Treating Similarly-Situated Taxpayers In a Similar Manner Is Reasonable and Constitutional. 27

E. *Armco Steel* Supports the Department's, Not Syntex's Position. 30

F. Syntex's Allegation That The Department Improperly Compromised Known Tax Liabilities Lacks Merit. 33

III. THE DEPARTMENT OF TREASURY HAS NOT VIOLATED SYNTEX'S RIGHTS TO DUE PROCESS 35

CONCLUSION AND RELIEF 37

PAGES 24 AND 25 OF

RESPONDENT-APPELLEE'S ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

(2) Non-filers' reliance upon the Department's bulletins. As noted above, the Department changed its initial position in 1980, when it determined that PL 86-272 stated the applicable nexus standard. While the Department continues to believe that an ultimate opposite conclusion was foreseeable, it recognized that taxpayers may have relied on the 1980 bulletin in structuring their business operations.

(3) The absence of records. Although taxpayers are required to maintain records which are necessary for the proper determination of their tax liability, MCL 205.28(3); MSA 7.657(28)(3), initially the burden is upon the Department to demonstrate nexus for taxation. While it may be reasonable to expect taxpayers to maintain records for at least 4 years,[1] the Department believed that it would not be reasonable to maintain

records for 17 years, i.e., beginning when the SBT was enacted. Without records it would be difficult and expensive for the Department to prove that a potential taxpayer had nexus in Michigan.

(4) The Department's limited resources. The Department was faced with the decision how best to allocate its limited resources in achieving maximum compliance with *Gillette* and *Guardian*. The Department does not have the resources to audit all taxpayers.

The Department of Treasury submits that it chose the most equitable and efficient method of applying *Gillette* and *Guardian* from among three different types of approach [sic], each of which would have been legal and reasonable. **First, the Department could have actively attempted to obtain compliance by all taxpayers with *Gillette* for tax years beginning in or after 1993 (the year *Gillette* and *Guardian* were decided). This would have**

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[1] Under the Internal Revenue Code records must be retained so long as they may be material in the administration of the Internal Revenue laws (IRS Reg § 1.601-1(1)). The Internal Revenue Service published its Guide to Retention Requirements on January 1, 1994 which suggests that records for income, deductions and credits, should be kept until the statute of limitations for the return expires. The general statute of limitations for assessing a deficiency under the IRC is three years.

been a viable alternative. (Emphasis added.) See *MCI v Treasury Dept*, 136 Mich App 28, 38; 355 NW2d 627 (1984). **(Department of Treasury could adopt postdecision policies of either taxing or not taxing two similarly situated taxpayers).** (Emphasis added.)

A second option would have been for the state to take appropriate action, i.e., to conduct audits or issue assessments, when the Department became aware of a nonfiling potential taxpayer. The legitimacy of such a policy was recognized recently in *Chrysler Rail Transportation Corp v Holt*, 845 F Supp 463 (1994) in which the U.S. District Court Judge stated:

> The primary purpose of Section 306 was to insure railroads were not taxed in a discriminatory manner when compared with all other commercial and industrial property. The plaintiff's complaint, however, is not that railroads are being discriminated against when compared to other businesses. Rather plaintiffs complain that other railroads who may be subject to this tax have not been discovered or have been discovered and have not been taxed. While it may be that the State has not acted with due diligence in ascertaining ownership of interstate railcars, the State has not acted improperly. *The State has chosen not to spend the time and money to actively seek out ownership information concerning all interstate railcars but instead has applied the tax if and when relevant ownership information becomes available and only if the amount of tax collectible makes collection worthwhile. While this method of*

> *enforcing the tax codes may be inefficient, it is not illegal.*
>
> I am satisfied that the state tax is not discriminatory and does not violate Section 306 of the 4R Act. The tax does not defy the purpose of Section 306. *The simple fact that the plaintiffs in this case have been found subject to the tax, while others who may be subject have not yet been discovered, does not make this tax discriminatory.*

Chrysler Rail, 845 F Supp, at 468 (emphasis added).

The Department chose a third option designed to achieve maximum compliance with an efficient allocation of scarce administrative resources. Thus, the Department decided actively to attempt to locate and to obtain compliance of unknown, nonfiling potential SBT taxpayers with *Gillette* for the four calendar years which preceded the decision.

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